FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 135

BILLY G. WOODY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1957

CERTIORARI GRANTED JUNE 30, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

No. 8163—Criminal

UNITED STATES OF AMERICA,

v.

BILLY G. WOODY

DOCKET ENTRIES

June 5, 1957. Filed Order Denying Leave to Proceed in Forma Pauperis.

Aug. 5, 1957. Filed Order Denying Leave to Proceed in Forma Pauperis.

Sept. 5, 1957. Filed Certificate of Trial Court.

Sept. 5, 1957. Filed Order Overruling and Denying Motion to Appeal in Forma Pauperis.

Oct. 10, 1957. Filed Certified copy of Order from U. S. Court of Appeals for Sixth Circuit denying petitioner leave to appeal in forma pauperis from order of District Court for Western District of Tennessee denying a motion to correct sentence and also denying motion to remand case to the district court for findings of fact and conclusions of law.

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENN., MEMPHIS, TENNESSEE

Pursuant to Title 28, Sec. 1915, U.S.C.

BILLY G. WOODY, Petitioner, pro se,

v.

UNITED STATES OF AMERICA, DR. R. O. SETTLE, M. D., Warden, U. S. Medical Center, Springfield, Missouri

MOTION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS —April 18, 1957

Ad Curiam:

May it please the court:

Comes now Billy G. Woody, and moves this court to file and proceed on application for writ of Habeas Corpus Ad Subjiciendum, In Forma Pauperis.

In support of such motion, petitioner submits:

AFFIDAVIT IN POVERTY

I, Billy G. Woody, being duly sworn, deposes and says: That he feels he has a meritorious cause of action to pursue on application for Habeas Corpus; that he is a citizen of the United States; that he is without funds with which to pay the costs of filing and otherwise; that this application *is not friviolous, and is taken in good faith.*

Billy G. Woody, petitioner pro se.

STATE OF MISSOURI,
County of Greene, ss:

Subscribed and sworn to before me this 18 day of April, 1957, A.D. My commission expires, .

M. E. Curtis, Notary Public, Record Clerk. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

[fol. 3] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENN., MEMPHIS, TENNESSEE

Pursuant to Title 28, U.S.C.A. Section 2241, 2242, 2243,.

BILLY G. WOODY, Petitioner, pro se,

v.

UNITED STATES OF AMERICA, DR. R. O. SETTLE, M. D., Warden, U. S. Medical Center, Springfield, Missouri

APPLICATION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM —April 18, 1957

Ad Curiam:

May it please the Court:

Comes now, Billy G. Woody, petitioner herein pro se, and makes application unto the court for relief by *habeas corpus*, on the grounds that he is being held in the custody of the respondents in violation of the Constitution and laws of the United States.

Respectfully submitted:

Brief in Support of Application for Writ of Habeas Corpus

Ad Curiam:

Comes now petitioner herein, pro se, and having heretofore filed an application for a writ of habeas corpus ad subjiciendum—now files this brief in support thereof.

Proposition

In view of the conflict of two United States Statutes of the Criminal Code, petitioner is entitled to his freedom in custody of the respondents for the alleged violation in count one of the indictment in that the petitioner is entitled to release on or about February 23, 1958. (less good time) (emphises ours)

In the hereinafter stated count two of the indictment which constitutes *double jeopardy*. The courts have repeatedly ruled that one crime cannot be split into two parts.

This foregoing proposition raises an issue in which he [fol. 4] has heretofore litigated in this court in case No. 8163, in which he filed a motion to vacate sentence under 28, U.S.C.A., 2255, under said Section of 2255, proved to be inadequate to test the legality of his sentence. He therefore properly litigated this court a collateral attack on the validity and Constitutionality of count two of the indictment for the alieged violation of Title 18, U.S.C.A. Supra. Section 2313, in view of the fact petitioner was sentenced on *count one* for violation of 18, U.S.C., Section 2312, prior to having had sentence imposed on count two.

United States Commissioner's Docket No. 1, Case No. 271, Warrant of arrest issued therefrom applicably states hereunto:

To any United States Marshal, or any other authorized officer:

You are hereby commanded to arrest, Billy G. Woody, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with transporting in interstate commerce from Sheffield, Alabama, to Savannah, Tennessee, a stolen motor vehicle, a 1952 two-door Riviera Buick, public Motor No. 68791050, confidential Motor No. 6879115, Serial No. 46633100, knowing the same to have been stolen, in violation of U.S.C., Title 18, Section 2312. (Dated April 14, 1954)

(S.) J. Louis Adams, U. S. Commissioner.

Further hereunto Indictment No. 8163 (undated), on count one and count two applicably states hereunto:

Count One (18-2312)

On or about March 16, 1954, Billy G. Woody Sr. transported in interstate commerce a stolen motor vehicle, towit, a 1952 Buick Riviera, Public Motor No. 68791050, Confidential Motor No. 6879115, Serial No. 46633100, from Sheffield, State of Alabama, to Savannah, state of Tennessee, in the Eastern Division of the Western District of Tennessee, and he then knew the motor vehicle to have been stolen.

(nm 5,000 nm 5 yrs. or both)

Count Two (18-2313)

On or about March 16, 1954, in the Western District of Tennessee, Billy G. Woody Sr., received and consealed a stolen motor vehicle, to-wit a 1952, Buick Riviera, Public Motor No. 68791050, Confidential Motor No. 6879115, Serial No. 46633100, which was moving as interstate commerce between Sheffield, State of Alabama, and Savannah, State of Tennessee, and he then knew the motor vehicle to have been stolen.

A True Bill.

(nm 5,000 or nm 5 yrs. or both)
(S.) B. H. Caldwell.

[fol. 5] Argument

Title 18, Sec. 2313 constitutes two distinct statutes for two specific offenses, or separarely one offense. However, one overt act in violation of one of the indicated statutes does not constitute two offenses punishable under the two indicated statutes.

Title 18, Sec. 2312, concerns itself with "transporting," and Title 18, Sec. 2313, concerns itself with "possession". Therefore, when one overt criminal act is executed, the sentencing therefor cannot be imposed on two separate statutory violations, but on one or the other of the cited statutes, nor can two sentences, imposed consecutively, be impositioned because the charge stems from one act inseparatable from either "possession" or "transporting" criminal statutory prosecuting provisions. Therefore, a sentence so consecutively imposed would constitute an illegal sentence in that such procedure is double jeopardy, and therefore the second sentence consecutive with the first should be null and void as Unconstitutional. Otherwise sentence on count two of same indictment must run concurrent with count one.

In addition to the forgoing—Count two of said indictment is invalid in that the Warrent Of Arrest reveals no such charge for the legal detention and custody of the petitioner for purpose of imposition of sentence on count No. two of said indictment, *because of no warrant for arrest for any such charge.*

To support the above allegations petitioner cites hereunto below:

Braer v. U.S., 9th Cir. Ct. of Appeals, the Court ruled:

> "A conviction must be good in all it's parts, the Indictment must be supported by evidence and the judgement must be supported by both. Lacking these qualities, fundimental in the administration of justice, we are constrained to reserve the judgment".

[fol. 6] U.S. v. Hosnick, 57 Sct. 126; U.S. v. Berkman, 254 U.S. 280, 403 S. Ct. 303; Hart v. U.S. 112 F. 2d 128. In: Stepp v. U.S. 128 F. 2d 261, the court held:

> "Unless the information or indictment sets forth all essential elements of an offense against the Government under the particular section of the statute the indictment is colorless, impossible or sustaining a sentence and the sentence so based is nullity; and subject to be set aside by proper motion in the original court or upon Habeas Corpus, if sentence is said to be enforced".

In: Huntley v. U.S. 118, F. 2d 858, and the court in U.S. v. Hess, 124, U.S. 399, ruled:

> "From the wording of the indictment it must appear that the violation of the particular statute has occurred. The ommission of any facts or circumstances necessary to constitute the offense is fatal on the attack".

Shaw v. U.S. 292, F. 2d. 399. Under the circumstances stated in U.S. v. Hess, Supra; the petitioner believes *concealment* was a fundamental part involving the element of the possession act. Belief supported by the case of Stewart v. U.S., 151, F. 2d. 386, wherein the court stated:

> "The larceny element offense of transporting a stolen automobile in interstate commerce is satisfied when there is a taking against will of owner or trespass to his possession". There was no protest nor taking against the will on case no. 8163. Brown v. White, U.S. (2d) 293, the court said: "No presumptions can be indulged in by the court in favor of the *indictment* to support any ommission in the instrument of the

necessary language or facts, nor can a charge based upon such presumptions. The mere wording of a statute itself is not sufficient to sustain the charges as such words are mere conclusions of the drawer".

Bratten v. U.S., 73, F. 2d. 502; White v. Lavine, 40, F. 2d. 502.

Clark v. U. S., 24, Fed. 696; Arnold v. Schlitz, 73, F. 2d. 381.

The petitioner contends that the basic counts of said indictment returned under the statutory of Title 18, Sec. 2313 U.S.C. was not properly envoked under said statute. Therefore, the invalidity of the null and void indictment could not legally authorize the level acceptance of a plea of guilty or finding of guilty, legally support or sustain a judgment rendered therein.

Deyonge v. Oregon, 299, U.S. 353, 256, in which the court said:

> "Conviction on charge not legally made by legal indictment would be sheer denial of due process jurisdiction to pronounce a particular sentence by statute is as essential as jurisdiction of a person and of a subject matter it must come from a statute properly envoked when legally charged by indictment".

Orfields Criminal Procedure, pages 126-127:

[fol. 7] Dayonge v. Oregon, 299, U.S. 352, also the U.S. Constitution Amendments 4, 5, 6, 7, and Fulbright v. U.S. Supra. pages 211, 213, 214; and Langon v. U.S. (C.C.A. 8th) 76 F. 2d. 817, 828. (Italics Supplied) relative to legal prequisites.

Ollie Otto Prince v. United States, Supreme Court, No. 132-October Term, 1956 (February 25, 1957).

Mr. Chief Justice Warren delivered the opinion of the Court.

The question presented by this case calls for interpretation of the Federal Bank Robbery Act, 18, U.S.C. Sec. 2113. That statute creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws. Included are bank robbery and entering a bank with intent to commit a robbery. We must decide

here whether unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation.

Petitioner entered the Malone State Bank, in Malone, Texas, through an open door and during regular banking hours. He asked for and received certain directions. Thereupon he displayed a revolver intimidating a bank employee and putting his life in jeopardy, and thus consummated a robbery. A grand jury returned a two-count indictment against him. The first charged the robbery offense; the second, entering the bank with the intent to commit a felony. Petitioner was convicted on both counts, and the district judge sentenced him to 20 years for robbery and 15 years for entering. The sentences were directed to be served consecutively. Some years thereafter, petitioner filed a "Motion To Vacate or Correct Illegal Sentence". The District Court, treating it as a proceeding under rule 35 of the Federal Rules of Criminal Procedure, denied relief without conducting a hearing. The Court of Appeals for the Fifth Circuit affirmed. 230, F.2d. 568.

Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the letter is consummated has puzzled the courts for several years. A conflict has risen between the circuits. We granted certiorari because of the recurrence of the question and to resolve the conflict. 351, U.S. 962. In addition to the court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purposes of punishment. None of these are particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The original Bank Robbery Act was passed in 1934. It covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. In 1937 the Attorney General requested that the act be amended. In his letter proposing the bill, the Attorney General declaired that "incongruous results" has developed under the existing law. He cited as a

striking instance the case of "—a man (who) was arrested [fol. 8] in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result it was not practicable to prosecute him under any Federal Statutes".

The act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: One for thefts of property exceeding $50, the other for lesser amounts. Congress further made it a crime to "—enter or attempt to enter any bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny—".

Robbery, entering and larceny were all placed in one paragraph of the 1-37 Act.

Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and $5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1,000 fine, while the maximum for the more serious theft was set at 10 years and $5,000. No separate penalty clause was added for the clause of unlawful entering. It was simply incorporated into the robbery provisions.

The Government asks us to interpret this statute as amended to make each a completely independent offense. It is necessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted the offender given 10 years for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum

penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank. Nor is there anything in the reports of the House of Representatives or the Senate on the floor debates to warrant such a reading of the statute.

It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, But is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statutes even if it is simply walking through an open, public door during normal business hours. Rather the h-art of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To [fol. 9] go beyond this reasoning would compel us to find that Congress intended by the 1937 amendment, to make drastic changes in authorized punishments. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.

We hold, therefore, that when Congress made either robbery or entry for that purpose a crime it intended the maximum punishment for robbery should remain at 20 years. But that even if the culpret should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.

While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for the purpose of resentencing the petitioner in accordance with this opinion. (Reversed and remanded)

Incorporated Motion for Findings of Facts and Conclusions of Law

Your petitioner most respectfully requests that the court issue a findings of facts and conclusions of law on each and

every point raised herein, in accordance with due process of law.

Prayer

It is therefore prayed that count two of the faulty indictment be expunged, vacated, made null and void.

For such order your petitioner shall ever so pray.

Certification

I, Billy G. Woody, petitioner herein pro se, swears that the foregoing is true in all its parts, and correct to the best of my ability, and knowledge.

Respectfully submitted, Billy G. Woody.

Subscribed and sworn to before me this 18 day of April, 1957, A.D.

My commission expires,

M. E. Curtis, Record Clerk, Notary Public, Authorized by the Act of July 7, 1955 to administer oaths.

[fol. 10] [File endorsement omitted]

In the United States District Court for the Western District of Tennessee, Eastern Division

No. 8163-Cr.

[Title omitted]

Order Denying Leave to Proceed In Forma Pauperis—Filed June 5, 1957

It appears that the petitioner herein forwarded a paper writing to the Clerk of this Court on April 22, 1957, which seems to be in the nature of a habeas corpus petition and wherein it appears that defendant is a physician and Warden of the United States Medical Center, Springfield, Missouri, which is without the jurisdiction of this Court, and upon all of which the petitioner desires to proceed in forma pauperis.

This Court was the Trial Judge upon the occasion of the conviction of petitioner and the Court is of the opinion that

the application is without merit and that there is no substantial question involved in the matter which the petitioner attempts to raise and, further, that the defendant Warden is not a resident of this Judicial District, from all of which the Court cannot see how any judgment it could render herein would be valid, it is

ORDERED that petitioner's motion to proceed in forma pauperis be denied.

Marion S. Boyd, United States District Judge.

Approved: Edward N. Vaden, Asst. United States Attorney.

[fol. 11] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

BILLY G. WOODY, Petitioner, pro se.

v.

UNITED STATES OF AMERICA

AFFIDAVIT OF POVERTY—Received 6/17/57

To the Court:

I, Billy G. Woody, being duly sworn, deposes and says: That he feels he has a meritorious cause of action to pursue on application for an *Appeal In Forma Pauperis*, that he is a citizen of the United States; that he is without funds with which to pay the costs of filing and otherwise; that this application is *not frivolous and is taken in good faith.*

Respectfully submitted by Billy G. Woody.

STATE OF MISSOURI,
County of Greene, ss:

Witnessed by Mr. M. E. Curtis this 14 day of June, 1957. Signed, M. Clinton. Record Clerk. Authorized by the Act of July 7, 1955 to administer oaths.

[fol. 12] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Received June 17, 1957

To the Court:

Comes now, Billy G. Woody, and respectfully submits this Notice of Appeal for the following reasons, to wit:

Court's jurisdiction of Criminal Procedure, Part 2, Appeals. Section 681, Title 18, Section 1915, Title 28, U.S.C.

The herein above appealant appeals from the Order of this Court issued on June 5, 1957, by the Hon. Judge Boyd, denying procedure *In Forma Pauperis* under the provisions of the United States Supreme Court in the case of George Johnson v. United States No. 531, Misc. Oct. Term 1956. Stating that such certification is not final in the sense that a convicted defendant is barred from showing that it was unwarranted and that an appeal should be allowed.

Please see also; Johnson v. Zerbst, 304 U. S. 458, in which the court stated: afford one who challenged that certification the aid of counsel. See also; Miller v. United States, 317 U. S. 192, 198.

Since the appealart does not have an assigned Counsel to assist him in prosecuting his application for leave to appeal in forma pauperis, and since it also appears that the court has exerted a substantial bias and prejudice in it's Order under date of June 5, 1957, in bypassing and passing the buck in stating that the application is without merit and that there is no substantial question involved in [fol. 13] the matter which the petitioner attempts to raise. The Court has also bypassed the jurisdiction in the first instance.

This Court has also bypassed the jurisdictional questions on his prior Motion under 2255 in a proper procedure outset in the Criminal Code, States in part: When motion under 2255 Title 28, U.S.C.A. * * *. proves inadequate to test the legality of a prisoners present restraint the only alternate remedy is on application into the sentencing court in habeas corpus proceeding to test the legality of any sentence or confinement.

Wherefore, the premises of law considered the appealant Prays for his Constitutional Right in appealing this above stated order to the United States Circuit Court of Appeals, for the Sixth Circuit, Cincinnati, Ohio, And to furnish to that Court also a transcript of record under the provisions of 2250, Title 28, U.S.C. and for such order the appealant so shall ever Pray.

This Appeal is taken in good faith and with merit, and is not friviolous.

Attached hereto and made a part of this appeal as if fully set out herein, the cases which petitioner relies upon.

Respectfully submitted by Billy G. Woody.

STATE OF MISSOURI,
County of Greene, ss:

Witnessed by Mr. M. E. Curtis this 14 day of June, 1957.

Signed, M.E. Curtis.

[fol. 14] ATTACHMENT TO NOTICE OF APPEAL

United States Supreme Court Ruling

George Johnson v. United States of America, No. 531 Misc. October Term, 1956.

Per CURIAM:

The petition for writ of certiorari is granted, as is leave to proceed *in forma pauperis*. By the Act of June 25, 1910, 36 Stat. 866, as now enlarged in 28 U.S.C. Sec. 1915, Congress provided for proceedings *in forma pauperis* on appeal unless "the trial court Certifies In Writing That It (the appeal) is not taken in good faith," Such certification is not final in the sence that the convicted defendant is barred from showing that is was unwarrented and that an appeal should be allowed. Of course, certification by the judge presiding at the trial carries great weight but, necessarily, it cannot be conclusive. Upon a proper showing a Court of Appeals has a duty to displace a District Court's certification. Moreover, a Court of Appeals must, under Johnson v. Zerbst, 304, U.S. 458,

afford one who challenges that certification the aid of counsel unless he insists on being his own,. Finally, either the defendant or his assigned counsel must be enabled to show that the grounds for seeking an appeal from the judgement of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith. This does not requite that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith. See: *Miller* v. *United States*, 317, U.S. 192, 198.

Since here the Court of Appeals did not assign counsel to assist petitioner in prosecuting his application for leave to appeal in forma pauperis and since it does not appear that Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining whether the District Court's certification was warranted, the judgement below must be vacated and the case remanded to the Court of Appeals for proceedings not inconsistent with this opinion. March 4, 1957.

Ollie Otto Prince v. United States, Supreme Court No. 132-Oct. Term, 1956, (February 25, 1957)

Mr. Chief Justice Warren delivered tbe openion of the Court.

The question presented by this case calls for interpretation of the Federal Bank Robbery Act, 18, U.S.C. Sec. 2113. That statute creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws. Included are bank robbery and entering a bank with intent to commit a robbery. We must decide here whether unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation.

Petitioner entered the Malone State Bank, in Malone, Texas, through an open door and during regular banking hours. He asked for and received certain directions. Thereupon he displayed a revolver intimidating a bank employee and putting his life in juopardy, and thus con-

summated a robbery. A grand jury returned a two-count indictment against him. The first charged the robbery offense; the second, entering the bank with the intent to [fol. 15] commit a felony. Petitioner was convicted on both counts, and the district judge sentenced him to 20 years for robbery and 15 years for entering. The sentences were directed to be served consecutively. Some years thereafter, petitioner filed a "Motion to Vacate or Correct Illegal Sentence". The District Court treating it as a proceeding under rule 35 of the Federal Rules of Criminal Procedure, denied relief without conducting a hearing. The Court of Appeals for the Fifth Circuit Affirmed. 230. F. 2d. 568.

Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the letter is consum-ated has puzzled the courts for several years. A conflict has risen between the circuits. We granted certiorari because of the recurrence of the question and to resolve the conflict. 251 U.S. 962. In addition to the court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purposes of punishment. None of these are particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The original Bank Robbery Act was passed in 1934. It covered only, robbery, robbery accompanied by an aggravated assaul*y*, and homicide perpetuated in commit-ing a robbery or escaping thereafter. In 1937 the Attorney General requested that the act be amended. In his letter proposing the bill, the Attorney General declaired that "incongruous results" had developed under the existing law. He cited as a striking instance the case of "—a man (who) was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of the employees, without displaying any force or violence and without putting anyone in fear—

necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result it was not practicable to prosecute him under any Federal Statutes".

The Act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: One for thefts of property exceeding $50, the other for lesser amounts. Congress further made it a crime to "— enter or attempt to enter any bank, with entent to commit in such bank or building or part thereof, so used, any felony or larceny—".

Robbery, entering and larceny were all placed in one paragraph of the 1-37 Act.

Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and $5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1,000 fine, while the maximum for the more serious theft was set at 10 years and $5000. No separate penalty clause was added for the clause of unlawful entering. It simply incorporated into the robbery provisions.

The Government asks us to interpret this statute as amended to make each a completely independent offense. It is necessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by [fol. 16] the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted the offender given 10 years for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank. Nor is there anything in the reports of the House of Representatives or the Senate on the floor debates to warrent such a reading of the statute.

It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of commit-ing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statutes even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended by the 1937 amendment, to make drastic changes in authorized punishments. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.

We hold, therefore, that when Congress made either robbery or entry for that purpose a crime it intended the maximum punishment for robbery should remain at 20 years. But that even if the culpret should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.

While reasonable minds might differ on this conclusion, we think it is consistant with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for the purpose of resentencing the petitioner in accordance with this openion. (Reversed and remanded.)

[fol. 17] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENN. MEMPHIS, TENNESSEE

Criminal Case No. 8163

BILLY G. WOODY, Petitioner,

vs.

UNITED STATES ATTORNEY, and, WARDEN, U. S. Medical Center, for Federal Prisoners, et al., Springfield, Missouri, Respondents

Pursuant to 28 U.S.C. Sec. 2255 and 28, U.S.C. 1915

MOTION TO CORRECT SENTENCE—Received 7/12/57

Comes now, Billy G. Woody, who now moves the above said court to correct his sentence according to applicable law, and in re thereof alleges and says the following.

Statement of Facts

That on the 24th day of June, 1954, the petitioner was charged and convicted for the violation of Sec. 2312 and 2313, of Title 18, U.S.C., and by virtue thereof was sentenced to a period of ten (10) years, that is five (5) years on count one and five years on count two, making a total of ten (10) years on the one overt act. And in addition thereto a fine of $250. was imposed. Petitioner was sentenced to the custody of the Attorney General or his authorized representatives, and is now at the United States Medical Center, Springfield, Mo.

United States Commissioner's Docket No. 1, Case No. 271, Warrent of Arrest issued therefrom applicably states hereunto:

To any United States Marshal, or any other authorized officer:

You are hereby commanded to arrest, Billy G. Woody, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with transporting in interstate commerce from Sheffield, Alabama, to Savannah, Tennessee, a stolen Motor vehicle, a 1952 two-door Riviera Buick, public Motor No. 68791050,

[fol. 18] confidential Motor No. 6879115, Serial No. 46633-100, knowing the same to have been stolen, in violation of U.S.C. Title 18, Section 2312.

(Dated April 14, 1954)

(S) J. Louis Adams, U.S. Commissioner.

Further hereunto Indictment No. 8163 (undated) on count one and count two applicably states hereunto:

Count One (18-2312)

On or about March 16, 1954, Billy G. Woody Sr. transported in interstate commerce a stolen motor vehicle, to-wit, a 1952 Buick Riviera, Public Motor No. 68791050, Confidential Motor No. 6879115, Serial No. 46633100, from Sheffield, State of Alabama, to Savannah, State of Tennessee, in the Eastern Division of the Western District of Tennessee, and he then knew the motor vehicle to have been stolen.

(nm 5,000 or nm 5 yrs. or both)

Count two (18-2313)

On or about March 16, 1954, in the Western District of Tennessee, Billy G. Woody, Sr. received and concealed a stolen motor vehicle, to-wit, a 1952 Buick Riviera, Public Motor No. 68791050, Confidential Motor No. 6879115, Serial No. 46633100, which was moving as interstate commerce between Sheffield, State of Alabama, and Savannah, State of Tennessee, and he then knew the motor vehicle to have been stolen.

A True Bill.

(nm 5,000 or nm. 5 yrs. or both)

(S) B. H. Caldwell.

Contentions

In the herein stated *count two* of the indictment which constitutes *double jeopardy*, the courts have repeatedly ruled that one crime cannot be split into two parts.

The foregoing proposition raises an issue in which petitioner has heretofore litigated in this court in case No. 8163, in which he filed a motion to vacate sentence under 28, U.S.C.

2255, under said Section; *however, this issue presents new evidence in view of the cited, Ollie Prince, Supra ruling, and* thus collateral attack, as follows:

Title 18, Sections 2312 and 2313, constitutes two distinct statutes for two specific offenses, or separately one offense. However, one overt act in violation of one of the indicated statutes does not constitute two offenses punishable under the two indicated statutes.

[fol. 19] Title 18, Section 2312, concerns itself with "transporting" and Title 18, Section 2313, concerns itself with "possession". Therefore, when one criminal act is executed, the sentencing therefor cannot be imposed on two separate statutory violations, but on one or the other of the cited statutes, nor can two sentences, imposed consecutively, be impositioned because the charge stems from one act inseparatable from either "possession" or "transportation". Therefore, a sentence so consecutively imposed would constitute an illegal sentence in that such procedure is *double jeopardy*, and therefore the second sentence consecutive with the first should be null and void as Unconstitutional. Otherwise sentence on count two of the same indictment must run concurrent with count one.

Ollie Otto Prince v. United States, Supreme Court, No. 132-October Term, 1956 (February 25, 1957)

Mr. Chief Justice Warren delivered the openion of the Court.

The question presented by this case calls for interpretation of the Federal Bank Robbery Act, 18, U.S.C. Sec. 2113. That statute creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws. Included are bank robbery and entering a bank with intent to commit a robbery. We must decide here whether unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation.

Petitioner entered the Malone State Bank, in Malone, Texas, through an open door and during regular banking hours. He asked for and received certain directions. Thereupon he displayed a revolver intimidating a bank employee and putting his life in jeopardy, and thus consummated a robbery. A grand jury returned a two-count indictment against him. The first charged the robbery offense;

the second, entering the bank with the intent to commit a felony. Petitioner was convicted on both counts, and the district judge sentenced him to 20 years for robbery and 15 years for entering. The sentences were directed to be served consecutively. Some years thereafter, petitioner filed a "Motion To Vacate or Correct Illegal Sentence". The District Court, treating it as a proceeding under rule 35 of the Federal Rules of Criminal Procedure, denied relief without conducting a hearing. The Court of Appeals for the Fifth Circuit affirmed. 230, F. 2d. 568.

Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the letter is consummated has puzzled the courts for several years. A conflict has risen between the circuits. We granted [fol. 20] certiorari because of the recurrence of the question and to resolve the conflict. 351, U.S. 962. In addition to the Court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purposes of punishment. None of these are particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The original Bank Robbery Act was passed in 1934. It concerned only robbery, robbery accompanied by an aggravated assault, and homicide perpetuated in commit-ing a robbery or escaping thereafter. In 1937, the Attorney General requested that the act be amended. In his letter proposing the bill, the Attorney General declaired that "incongruous results" had developed under the existion law. He cited a striking instance the case of "—a man (who) was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result it was not practicable to prosecute him under any Federal Statutes.

The act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: One for thefts of property exceeding $50, the other for lesser amounts. Congress further made it a crime to "—enter or attempt to enter any bank, with intent to commit in such a bank or building or part thereof, so used, any felony or larceny—".

Robbery, entering and larceny were all placed in one paragraph of the 1937 Act.

Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and $5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1,000 fine, while the maximum for the more serious theft was set at 10 years and $5,000. No separate penalty clause was added for the clause of unlawful entering. It was simply incorporated into the robbery provisions.

The Government asks us to interpret this statute as amended to make each a completely independent offense. It is necessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended to also pyramid the penalities.

[fol. 21] The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted the offender given 10 years for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank. Nor is there anything in the reports of the House of Representatives or the Senate on the floor debates to warrent such a reading of the statute.

It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of

commit-ing a crime, but is f-ustrated for some reason before completing the crime. The gravamen of the offence is not in the act of entering, which satisfies the terms of the statutes even if it is simply walking through an open, public door during normal business hours. Rather the h-art of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended by the 1937 amendment, to make drastic changes in authorized punishment. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.

We hold, therefore, that when Congress made either robbery or entry for that purpose a crime it intended the maximum punishment for robbery should remain at 20 years. But that even if the culpret should fall short of accomplishing his purpose he could be imprisoned for 20 years for entering with the felonious intent.

While reasonable minds might differ on this conclusion, we think it is consistant with our policy of not attributing to Congress, in the enactment of Criminal statutes, an intention to punish more severely than the language of it's laws clearly imports in the light of pertinent legislative history.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for the purpose of resentencing the petitioner in accordance with this opinion. (Reversed and remanded)

United States v. Mazzochi, 75 F. 2d. 497—Reversed and sentences reduced to the maximum for a single sentence for a single count.

"The Court sentenced two defendants to 2 years imprisonment on each count to be served consecutively and to two fines of $10,000 each this duplicating the maximum sentence. The Court held; "*Judgment reversed, sentence reduced to the maximum for a single count.*

[fol. 22] Braverman v. United States, 63, S. Ct. 99, 317 U.S. 49 (November 9, 1942)

From Article 1, Section 1, U.S.C.A. Federal Constitution.

1. Congress has the power to create separate and distinct offenses growing out of the same act, *but whenever it appears that the proof of one offense proves every essen-*

tial element of another growing out of the same act, the 5th Amendment limits the punishment to a single act. Freeman v. United States, (C.C.A.) 146 F. 2d. 978.

2. It is for Congress to prescribe penalties for laws which it writes, *and it would transcend both the Judicial and the Administrative function to make additions to those which Congress has placed behind a statute.* L. P. Stewart v. Bowles, 64, S.C.T., 1097, 322 U.S. 398, 88 L. Ed. 1350.

3. Congress may declare a policy and fix a definite standard by which an Administrator is to be controlled and authorize him to make subordinat- rules for administration of the act. But Congress cannot permit the Administrator to determine what the law shall be. Payne v. Griffin, 51 Fed. Supp. 588.

In addition to the foregoing—Count two of said indictment is invalid in that the *Warrent of Arrest* reveals no such charge for the legal detention and custody of the petitioner for purpose of imposition of sentence on count two of said indictment, *because of no warrent for arrest for any such charge.* Because two charges weren't involved.

To support the above allegations petitioner cites hereunto below:

Braer v. U.S., 9th Cir. Ct. of Appeals, the Court ruled:

> "A conviction must be good in all it's parts, the Indictment must be supported by evidence and the judgment must be supported by both. Lacking these qualities, fundimental in the administration of justice, we are constrained to reserve the ju-gment".

U.S. v. Hosnick, 57 Sct. 126; U.S. v. Berkman, 254 U.S. 280, 403, S. Ct. 303; Hart v. U.S. 112 F. 2d. 128.

In: Stepp v. U.S. 128, F. 2d. 261, the court held:

> "Unless the information or indictment sets forth all essential elements of an offense against the Government under the particular section of the statute the indictment is colorless, impossible or sustaining a sentence and the sentence so based is nullity; and subject to be set aside by proper motion in the original court or upon ***habeas corpus***, if the sentence is said to be enforced".

In: Huntley v. U.S. 118, F. 2d. 858, and the court in, U.S. [fol. 23] v. Hess, 124, U.S. 399, ruled:

> "From the wording of the indictment it must appear that the violation of the particular statute has occurred. The omission of any facts or circumstances necessary to constitute the offense is fatal in the attack".

Shaw v. U.S. 292, F. 2d. 399.

Under the circumstances stated in U.S. v. Hess, Supra; the petitioner believes *consealment* was a fundamental part involving the element of the *possession* act. Belief supported by the case of Stewart v. U.S., 151, F. 2d. 386, wherein the court stated:

> "The larceny element offense of transporting a stolen automobile in interstate commerce is satisfied when there is a taking against will of owner or trespass to his possession".

There was no protest nor taking against the will in case No. 8163.

Brown v. White, U.S. (2d) 293, the court said:

> "No presumptions can be indulged in by the court in favor of the *indictment* to support any omission in the instrument of the necessary language or facts, nor can a charge based upon such presumptions. The mere wording of a statute itself is not sufficient to sustain the charges as such words are mere conclusions of the drawer".

Bratten v. U.S., 73, F. 2d. 502; White v. Lavine, 40 F. 2d. 502.

Clark v. U.S., 24, Fed. 696. Arnold v. Schlitz, 73, F. 2d. 381.

The petitioner contends that the basic counts of said indictment returned under the statutory of Title 18, Sec. 2313 U.S.C. was not properly envoked under said statute. Therefore, the invalidity of the illegal indictment could not legally authorize a plea of guilty or finding of guilty, legally support or sustain a judgment rendered therein.

Dayonge v. Oregon, 299, U.S. 353, 256, in which the court said:

> "Conviction on charge not legally made by legal indictment would be sheer denial of due process jurisdiction to pronounce a particular sentence by statute is as essential as jurisdiction of a person and a subject matter, it must come from a statute properly envoked when legally charged by indictment". Orfields Criminal Procedure, pages 126. 127.

Dayong v. Oregon, 299, U.S. 353, also the U.S. Constitution Amendments, 4, 5, 6, 7, and Fulbright v. U.S. Supra pages 211, 213, 214; and Langon v. U.S. (C.C.A. 8th.) 76 F. 2d. 817, 828. (Italics Supplied) relative to legal prerequisites.

[fol. 24] ATTACHMENT TO MOTION TO CORRECT SENTENCE

Petition for Writ of Habeas Corpus Ad Testificandum

In so far as the motion attached hereto under authority of Title 28, U.S.C.A., 2255, it clearly enunciates the "judicial discretion" and empowers the court with absolute jurisdiction of the subject matter. However concerning the right of a petitioner to personally appear, there has been a recent U.S. Supreme Court decision that should bear earnest study as a necessary component to consideration of the issuance of an order as herein prayed for.

The U.S. Supreme Court, in discussing the case of Hayman v. U.S. (187 F. 2d 456) 96 L. ed. advanced opinion 208, January 7, 1952, Ruled:

> "Section 2255 Title 28, U.S.C.A., lawful and states: If points involved are meritorious or vital the petitioner should be present at the hearing".

Supporting this statement the U.S. Supreme Court cited, U.S. v. Paglia 190, F. 2d 445, 448, C.C.A. Md. Circuit:

> "The Circuit Court of Appeals for the Second Circuit has ordered in Section 2255 proceedings that a "hearing" be held in open court with the petitioner present and free to testify . . ."

Further citing Barrett v. Hunter, 180, F. 2d 510, 514 (C.C.A. 10th. Cir.)

> "Whether the petitioner should be produced depends on the issues raised by the particular case. Whereas, here they are substantial issues of facts as to events in which prisoner participated, the trial court should require his production for a hearing".

Prayer

It is therefore prayed that count two of the illegal sentence be made null and void, and vacated.

For such order your petitioner shall ever so pray.

Incorporated Motion for Findings of Fact and Conclusions of Law

Your petitioner most respectfully requests that the court issue a findings of facts and conclusions of law on each and every point raised herein, in accordance with *due process of law*. (28 U.S.C. 2255)

[fol. 25]

Affidavit

28, U.S.C. 1915

This is to Certify that I, Billy G. Woody, do hereby dispose, say and swear to the following:

1. That I am a Citizen of the United States of America.

2. That I am without monetary funds, property of value, and financially dist-ute.

3. That I am proceeding respectfully and in good faith, and seek to have the court allow the instant motion to be fully prosecuted under provisions of 28, U.S.C. 1915.

In substantiation hereunto I set my signature hereon this 10 day of July, 1957.

Billy G. Woody.

Oath of Verification

I, Billy G. Woody, petitioner herein disposes, swears and says that the foregoing is true in all its parts, and correct to the best of my ability and knowledge.

Respectfully submitted, Billy G. Woody, petitioner.

Sworn and subscribed to before me:

Witnessed by, Mr. M. E. Curtis, this 10 day of July, 1957.

M. E. Curtis, Record Clerk Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

[fol. 26] [File endorsement omitted]

In United States District Court for the Western District of Tennessee, Eastern Division

No. 8163-Cr.

[Title omitted]

Order Denying Leave to Proceed in Forma Pauperis—Filed August 5, 1957

It appears that the petitioner herein forwarded a paper writing to the Clerk of this Court on July 12, 1957, which seems to be in the nature of a proceeding under Section 2255, Title 28, U.S.C. and Section 1915, Title 28, U.S.C., wherein the United States Attorney and the Warden of the Medical Center for Federal Prisoners at Springfield, Missouri, are made respondents and in which the petitioner appears to be moving the Court to correct the sentence or judgment heretofore rendered against petitioner under which he is now incarcerated and upon all of which the petitioner desires to proceed in forma pauperis.

The Court has knowledge that the petitioner has filed several petitions under Section 2255 and in this paper writing the petitioner appears to be attacking the indictment, claiming same to be invalid, a matter which should have been raised at or before the time of trial, petitioner having

been found guilty by a jury of a Dyer Act violation, being [fol. 27] then represented by counsel which he employed. This Court sat as Trial Judge in the case at the time it was tried and is thoroughly familiar with the facts as they were then presented by all the parties, from all of which the Court is convinced there is no merit to the contentions set out in the paper writing nor could any substantial question be raised, certainly not as here set out, and therefore that the petitioner should not be allowed to proceed in forma pauperis.

It is therefore Ordered that Petitioner's motion to proceed in forma pauperis be denied.

(S.) Marion S. Boyd, United States District Court Judge.

Approved: (S.) Edward N. Vaden, Assistant United States Attorney.

[fol. 28] In the United States District Court for the Western District of Tenn. Memphis, Tennessee

[Title omitted]

Notice of Appeal—August 9, 1957

(1) Comes now, Billy G. Woody, who most respectfully and in good faith seeks to advise the Court that he will appeal the decision in the above-indicated case, from each and every part of the judgment entered thereon, and exceptions thereto as evidenced herein, on August 5, 1957, A.D.

(2) Furthermore hereunto petitioner seeks to have the Court allow him to Appeal in forma pauperis procedure (28 U.S.C.A. 1915), and Johnson v. U.S. No. 531, Misc. October Term, Supreme Court, 1956, which is quoted below): Per Curiam:

The petition for writ of certiorari is granted, as is leave to proceed *in forma pauperis*. By the Act of June 25, 1910, 36 Stat. 866, as now enlarged in 28 U.S.C. Sec. 1915, Congress provided for proceedings *in forma pauperis* on appeal unless "the trial court Certifies in Writing That It (the appeal) is not taken in good faith," Such certification is not final in the sense that the convicted defendant is barred

from showing that it was unwarranted and that an appeal should be allowed. Of course, certification by the judge presiding at the trial carries great weight but, necessarily, it cannot be conclusive. Upon a proper showing a Court of Appeals has a duty to displace a District Court's certification. Moreover, a Court of Appeals must, under Johnson v. Zerbst, 304, U.S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his own. Finally, either the defendant or his assigned counsel must be enabled to show that the grounds for seeking an appeal from the judgment of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith. This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith. See: Miller v. U.S., 317, U.S. 192, 198.

[fol. 29] Since here the Court of Appeals did not assign counsel to assist petitioner in prosecuting his application for leave to appeal in forma pauperis and since it does not appear that Court of Appeals assured petitioner adequate means of presenting it with a fair bases for determining whether the District Court's certification was warranted, the judgment below must be vacated and the case remanded to the Court of Appeals for proceedings not inconsistent with this opinion. March 4, 1957.

(3) Petitioner most respectfully and in good faith contends that the Court has shown bias and prejudice in the undertaken cause in that the Court ruled on matters extrinsic to the cause, and *did not make a finding of facts and conclusions of law on all points raised thereon,* contrary to provisions of 28, U.S.C., 2255

Pauper Statement

I, Billy G. Woody, do hereby dispose, say and swear to the following:

(1). That I am a Citizen of the United States of America.

(2). That I am without monetary funds, property of value, and financially dist-ute.

(3). That I am proceeding respectfully and in good faith, and seek to have the court allow this Notice of Appeal to be fully prosecuted under provisions of 28, U.S.C. 1915.

Oath of Verification

I, Billy G. Woody, petitioner herein disposes, swears and says that the foregoing is true in all it's parts, and correct to the best of my ability and knowledge.

Respectfully submitted, Billy G. Woody, petitioner.

Sworn and subscribed to before me:

Witnessed by Mr. M. E. Curtis, this 12 day of August, 1957.

M. E. Curtis, Record Clerk Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)

[fol. 30] [File endorsement omitted]

In United States District Court for the Western District of Tennessee, Eastern Division

No. 8163

[Title omitted]

Certificate of Trial Court—September 5, 1957

I, Marion S. Boyd, Judge of the United States District Court for the Western District of Tennessee, hereby certify that the appeal herein sought by the defendant, Billy G. Woody, from an order of this Court denying defendant leave to proceed in forma pauperis on a motion to vacate sentence entered on August 5, 1957, is without merit and not taken in good faith.

(S.) Marion S. Boyd, United States District Judge.

[fol. 31] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

No. 8163

[Title omitted]

ORDER OVERRULING AND DENYING MOTION TO APPEAL IN FORMA PAUPERIS—Filed September 5, 1957

It appears in this cause that the defendant herein has sworn to a statement on August 12, 1957, setting out the fact that he is a pauper and that he desires to proceed in this cause under a notice of appeal from findings of this Court dated August 5, 1957, wherein the Court rendered a decision adverse to the defendant, and the Court having considered the record herein, and all the facts and circumstances surrounding same, is of the view that the appeal sought herein is without merit and not taken in good faith, the Court simultaneously filed herein a certificate within the purview of Title 28, Section 1915, U.S.C., and from a consideration of all of which,

It is By the Court Ordered and Adjudged that the application of the defendant for leave to appeal in forma pauperis be, and the same is, overruled and denied.

(S.) Marion S. Boyd, United States District Judge.

[fols. 32-33] Triple Certificate to foregoing transcript omitted in printing

[fol. 34] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, CINCINNATI, OHIO

No. 8163

Date: September , 1957.

[Title omitted]

APPLICATION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS—Filed September 14, 1957

1. Filed pursuant to provisions of 28, U.S.C. Sec. 1915: Augmented by authority of Johnson v. U.S., supra, No. 531, Misc., Oct. Term, 1956.

2. Comes now, Billy G. Woody, petitioner who most respectfully and in good faith alleges and says the following:

3. Under July 12, 1957, petitioner filed with the United States District Court, Memphis, Tennessee, a Motion To Correct Sentence, which in part, and appella*te* consideration is sought, stated that the sentence imposed by the court was partly illegal, in view of the Ollie Prince v. U.S., Supra, Case, No. 132, Oct. Term, 1956; in that connection the U.S. Supreme Court held that one offense could not be divided into two offenses and result in two sentences, when the action for the alleged offenses were interchangeably related, without a part of interchangeable action for criminal *complaint* the other complaint would not have been constituted. That motion alleged that inasmuch as the Honorable Judge Boyd, U.S. District Court, Memphis, Tenn., on June 24, 1954, imposed a five year sentence on petitioner for, in effect, *possession* of a stolen automobile, and on the same date imposed a five year sentence on *violation* of the Dyer Act (Title 18, Secs. 2312, 2313) such sentences to run consecutive one after the other, in view of the Ollie Prince v. U.S., Supra, ruling, [fol. 35] the last five year sentence was illegal, and petitioner prayed that the first sentence imposed on violation of Title 18, Section 2312, remain undisturbed, and that the consecutively imposed five year sentence for violation of Title 18, Section 2313, be vacated and adjudged null and void per Ollie Prince, Supra, Case.

4. Attached is a copy of the Order of said court in re hereof, dated August 5, 1957, and marked *Exhibit A.*

5. Also attached is a copy of the Order dated Sept. 5, 1957, given by said court in response to a Notice of Appeal to the above-indicated ruling of August 5, 1957, and marked *Exhibit B.*

6. Petitioner alleges that the Court did not properly hear the said motion, and did not make a finding of facts and conclusions of law on the issues raised in said motion as cited herein—as provided for by 28, U.S.C., Sec. 2255—and did not act according to Ollie Prince Supra, ruling.

7. Johnson v. U.S. Supra, No. 531, Oct. Term, 1956, provides as following:

The petition for writ of certiorari is granted, as is leave to proceed *in forma pauperis.* By the Act of June 25, 1910, 36 Stat. 866, as now enlarged in 28 U.S.C. Sec. 1915, Congress provided for proceedings *in forma pauperis* on appeal unless "the trial court Certifies in Writing That It (the appeal) is not taken in good faith". Such certification is not final in the sense that the convicted defendant is barred from showing that it was unwarranted and that an appeal should be allowed. Of course, certification by the judge presiding at the trial carries great weight but, necessarily, it cannot be conclusive. Upon a proper showing a Court of Appeals has the duty to displace a District Court's certification. Moreover, a Court of Appeals must, under Johnson v. Zerbst, 304, U.S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his own. Finally, either the defendant or his assigned counsel must be enabled to show that the grounds for seeking an appeal from the judgment of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith. This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith. See: *Miller* v. *United States*, 317, U.S. 192, 198.

[fol. 36] Prayer

8. In view of the fact that the said district court did not make a finding of fact and conclusion of law, and therefore reversable judicial errors, and that the certification of the said district court as to not being taken in good faith is not final and complete under the circumstances, your petitioner prays that the court will grant him leave to file and proceed in forma pauperis on a Motion To Remand said case, or appoint counsel to more properly present this application, he so ever prays.

9. Distribution: Original and two copies to this court; One copy to U.S. Attorney, Memphis, Tenn.; One copy to the Warden, U.S. Medical Center, Springfield, Mo.

Oath of Verification

10. I, Billy G. Woody, petitioner herein, do swear that the foregoing petition is true in all it's parts, and correct to the best of my knowledge.

11. Respectfully submitted, ——, ——.

Notary Statement

Sworn and subscribed to before me:

Witnessed by, Mr. M. E. Curtis, this day of September, 1957.

——, ——.

[fol. 37] Exhibit A. Omitted. Printed side page 29 ante

[fol. 38] Exhibit B(1). Omitted. Printed side page 33 ante

[fol. 39] Exhibit B(2). Omitted. Printed side page 32 ante

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

No. —

[Title omitted]

RESPONSE OF THE UNITED STATES OF AMERICA TO APPLICATION FILED BY BILLY G. WOODY FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS—Filed September 17, 1957

Comes now the United States of America and says Judge Boyd was correct. The jury, after a hard fought trial, found Woody guilty on both counts of unlawful transportation and concealment of a stolen motor vehicle. The consecutive sentences were correct. *Crawford* v. *United States,* (6th Cir.) 214 F. 2d, 313. There was no merit in the attempted appeal.

Respectfully submitted, (S.) Millsaps Fitzhugh, United States Attorney, Western District of Tennessee. (S.) Edward N. Vaden, Assistant United States Attorney, Western District of Tennessee. Post Office Building, Memphis, Tennessee.

[fol. 41] Certificate of Service (Omitted in printing)

[fol. 42] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CINCINNATI, OHIO

No. 8163

Date: Sept. , 1957.

BILLY G. WOODY, P.M.B. Box 9897-H, U.S. Medical Center, Springfield, Mo., Petitioner,

vs

UNITED STATES OF AMERICA, Respondent.

Pursuant To: 28 U.S.C. 2255; 28 U.S.C. 1915; George Johnson vs. U.S., Supra, No. 531, Oct. Term, 1956; Ollie Prince vs. U.S., Supreme Ct. No. 132, Oct. Term, 1956, (Feb. 25, 1957); 37A Fed. Rules of Cr. Proc., and 28, U.S.C., 1291

MOTION TO REMAND—Filed September 18, 1957

Statement of Jurisdiction:

A. The Court of Appeals shall have jurisdiction of Appeals from all final decisions of the district courts of the United States—except where a direct review may be had in the Supreme Court. 28, U.S.C., Section 1291. Also see Rule 37A, Fed. Rules of Cr. Proc.

B. Comes now, Billy G. Woody, petitioner herein, who most respectfully alleges and says the following:

1

Under No. 8163, the Grand Jury, at Jackson, Tennessee, returned an (evidently undated) indictment against petitioner:

Count One: (18-2312)

On or about March 16, 1954, Billy G. Woody Sr., transported in interstate commerce a stolen motor vehicle, to-wit, a 1952 Buick Riviera, Public Motor No. 6879050, Confidential Motor No. 6879115, Serial No. 46633100, from Sheffield, State of Alabama, to Savannah, State of Tennessee, in the

Eastern Division of the Western District of Tennessee, and he then knew the motor vehicle to have been stolen.

(nm 5,000 nm 5yrs, or both)

Count Two: (18-2313)

On or about March 16, 1954, in the Western District of Tennessee Billy G. Woody Sr., received and concealed a stolen motor vehicle, to-wit, a 1952, Buick Riviera, Public Motor No. 68791050, Confidential Motor No. 6879115, Serial No. 46633100, which was moving as interstate commerce between Sheffield, State of Alabama, and Savannah, State of Tennessee, and he then knew the motor vehicle to have been stolen.

A True Bill (nm 5,000 nm 5yrs. or both)

(S.) B. H. Caldwell.

[fol. 43]

II

On June 24, 1954, U.S. District Court, Jackson, Tennessee, after a jury trial, petitioner was sentenced to a term of *five* years on count one, and *five* years on count two, to be served consecutively, after a verdict of guilty.

III

On or about July 21, 1954, petitioner was committed to the U.S. Penitentiary, Terre Haute, Indiana, to serve said sentence, where he was declared psychotic in or about August 24, 1954, and transferred to the Medical Center for Federal Prisoners, Springfield, where he is presently confined. Petitioner was removed from psychotic status during September 1957.

IV

On or about July 12, 1957, petitioner filed a "Motion To Correct Sentence", under provisions of 28 U.S.C. 2255, claiming that in view of the Ollie Prince, Supra, ruling (No. 132, Oct. Term, 1956) the said sentence was illegal, in that that Court held that two criminal statutes could not be applied on a violation of one or the other of such statutes interchangeably; therefore, since petitioner was sentenced for "*transporting*, and for *possession*, on one overt act, said sentence being alleged as illegal.

V

On or about August 5, 1957, said district court issued an order on said motion, making *no* findings of facts and conclusions of law on the points raised therein, as provided by 28 U.S.C. 2255. The points raised were substantial and with merit and as cited herein were not previously raised. A copy of that Order is attached and marked Exhibit A.

VI

Under date of August 12, 1957, Petitioner filed Notice of Appeal in re of said Order seeking leave to Appeal in Forma Pauperis per provisions of 28, U.S.C. 1915. Incorporated therein was an Affidavit of Bias and Prejudice. According to provisions of 28, U.S.C. 144, Judge Boyd, should have disqualified —illegible— case. However, under date of [fol. 44] September 5, 1957, the Honorable Judge Boyd issued an Order in re of said Notice of Appeal, which is attached and marked Exhibit B. The said exhibit includes a Certificate, signed by the said U.S. District Judge, certifying that the appeal is not taken in good faith. (Johnson vs. U.S., No. 531, U.S. Supreme Court, Oct. Term, 1956, states that said Order is not final and is subject to review, as cited in Points of Authority herein.

VII

Previous to filing of said Motion to Correct Sentence, subject filed a similar motion to vacate sentence, in re of a question of insanity. Contrary to Gregori vs. U.S., April 1957, 5th C.C.A., 243, F. 2d, 48, and Bishop vs. U.S., Supra, Cited therein, which cases were remanded under identical questions of law; said district court denied such motion, and U.S. Court of Appeals for the Sixth Circuit denied (prior to the Gregori ruling) leave to appeal from such a judgment, this prior to the Johnson vs. U.S. ruling, as cited. There has therefore been a marked degree of prejudice exhibited by the said U.S. District Court.

VIII

Prayer

Petitioner prays that the court remand for established merit of law the said case to the U.S. District Court for

proper and prompt judicial process consistent with provisions of 28, U.S.C., 2255, namely a proper finding of facts and conclusions of law on the legal points raised in said Motion To Vacate Sentence dated July 12, 1957. He so ever prays, as the first sentence on count one less good time expires on February 23, 1958, and thereafter be illegal according to Ollie Prince vs. U.S., Supra.

[fol. 45] IX

Certificate of Service:

I do hereby affirm and say that I have served, by mail, under this notary date, a copy of instant Motion—upon the U.S. Attorney, Federal Building, Memphis, Tennessee, giving said mail to below cited prison officer for administrative processing.

X

Affidavit of Pauper Statement

I, Billy G. Woody, do hereby dispose, say and swear to the following:

(1) That I am a Citizen of the United States of America;

(2) That I am without monetary funds, property of value, and financially dist-ute;

(3) That I am proceeding respectfully and in good faith, and seek to have the court allow this Motion to Remand to be fully prosecuted under provisions of 28, U.S.C. 1915.

XI

Oath of Verification

I, Billy G. Woody, petitioner herein disposes, swears and says that the foregoing is true in all it's parts, and correct to the best of my ability and knowledge.

Respectfully submitted, Billy G. Woody.

Points of Authority Attached and, Exhibits, A, B, (1), (2), pages 3-11.

Sworn and subscribed to before me:

Witnessed by Mr. M. E. Curtis, this, day of September, 1957.

——, ——.

[fol. 46] Points of Authority

(A) 28, U.S.C. 2255: Federal Custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established be Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof *the* be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court

has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. as amended May 24, 1949, c. 139, Sec. 114, 63 Stat. 105.

(B) Johnson vs. U.S., No. 531, Oct. Term, 1956, Supra:

The petition for writ of certiorari is granted, as is leave to proceed *in forma pauperis*. By the Act of June 25, 1910, 36 Stat. 866, as now enlarged in 28 U.S.C. Sec. 1915. Congress provided for proceedings *in forma pauperis* on appeal unless "the trial court Certifies in Writing That it (the appeal) is not taken in good faith." Such certification is not final in the sense that the convicted defendant is barred from showing that it was unwarranted and that an appeal should be allowed. Of course, certification by the judge presiding at the trial carries great weight but, necessarily, it cannot be conclusive. Upon a proper showing a Court of Appeals has the duty to displace a District Court's certification. Moreover, a Court of Appeals must, under Johnson vs. Zerbst, 304, U.S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his [fol. 47] own. Finally, either the defendant or his assigned counsel must be enabled to show that the grounds for seeking an appeal from the judgment of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith. This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the bases of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith. See: *Miller* v. *United States*, 317, U.S. 192, 198.

Since here the Court of Appeals did not assign counsel to assist petitioner in prosecuting his application for leave to appeal in forma pauperis and since it does not appear that Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining whether the District Court's certification was warrented, the judgment below must be vacated and the case remanded to the Court

of Appeals for proceedings not inconsistent with this opinion. March 4, 1957.

(C) Ollie Prince vs. U.S., Supreme Court, No. 132, Oct. Term, 1956, (Feb. 25, 1957):

Mr. Chief Justice Warren delivered the opinion of the Court.

The question presented by this case calls for interpretation of the Federal Bank Robbery Act, 18, U.S.C. Sec. 2113. That statute creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws. Included are Bank robbery and entering a bank with intent to commit a robbery. We must decide here whether unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation.

Petitioner entered the Malone State Bank, in Malone, Texas, through an open door and during regular banking hours. He asked for and received certain directions. Thereupon he displayed a revolver intimidating a bank employee and putting his life in jeopardy, and thus consummated a robbery. A grand jury returned a two-count indictment against him. The first charged the robbery offense; the second, entering the bank with the intent to commit a felony. Petitioner was convicted on both counts, and the district judge sentenced him to 20 years for robbery and 15 years for entering. The sentences were directed to be served consecutively. Some years thereafter, petitioner filed a "Motion To Vacate or Correct Illegal Sentence". The District Court, treating it as a proceeding under rule 25 of the Federal Rules of Criminal Procedure, denied relief without conducting a hearing. The Court of Appeals for the Fifth Circuit affirmed. 230, F. 2d 588.

Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the letter is consummated has puzzled the courts for several years. A conflict has risen between the circuits. We granted certiorari because of the recurrence of the question and to resolve the conflict. 251, U.S. 962. In addition to the Court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of other crimes for the purpose of punishment. None of these are particularly helpful to us

because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this gen- [fol. 48] eral field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The original Bank Robbery Act was passed in 1934. It concerned only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in commit-ing a robbery or escaping thereafter. In 1937, the Attorney General requested that the act be amended. In his letter proposing the bill, the Attorney General declared that "incongruous results" had developed under the existing law. He cited a striking instance the case of "—a man (who) was arrested in a national bank while walking out of the building with $11,000 of the Bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result it was not practicable to prosecute him under any Federal Statutes.

The act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: One for thefts of property exceeding $50, the other for lesser amounts. Congress further made it a crime to "—enter or attempt to enter any bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny——".

Robbery, entering and larceny were all placed in one paragraph of the 1937 Act.

Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and $5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1,000 fine, while the maximum for the more serious theft was set at 10 years ans $5,000. No separate penalty clause was added for the clause of unlawful entering. It was simply incorporated into the robbery provisions.

The Government asks us to interpret this statute as amended to make each a completely independent offense. It is necessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended to also pyramid the penalties.

The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted the offender given 10 years for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank. Nor is there anything in the reports of the House of Representatives or the Senate on the floor debates to warrent such a reading of the Statute.

[fol. 49] It is a fair inference from the wording in the Act, uncontracicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of commitiong a crime, but is f-ustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statutes even if it is simply walking through an open, public door during normal business hours. Rather the h-art of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compell os to find that Congress intended by the 1937 amendment, to make drastic changes in authorized punishment. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.

We hold, therefore, that when Congress made either robbery or entry for that purpose a crime it intended the maximum punishment for robbery should remain at 20 years. But that even if the culpret should fall short of

accomplishing his purpose he could be imprisoned for 20 years for entering with the felonious intent.

While reasonable minds might differ on this conclusion, we think it is consistant with our policy of not attributing to Congress, in the enactment of Criminal statutes, an intention to punish more severely than the language of it's laws clearly imports in the light of pertinent legislative history.

The judgement of the Court of Appeals is reversed and the case is remanded to the District Court for the purpose of resentencing the petitioner in accordance with this opinion. (Recersed and remanded)

[fol. 50] Exhibit A to Motion to remand omitted. Printed side page 29 ante

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[fol. 51] Exhibit B(1) omitted. Printed side page 33 ante

[fol. 52] Exhibit B(2) omitted. Printed side page 32 ante

[fol. 53] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO

No. 8163

Date: Sept. 18, 1957.

[Title omitted]

TRAVERSE—Filed September 21, 1957.

Comes now, Billy G. Woody, petitioner herein, who offers the following in traverse to the document entitled "Response Of The United States Of America", dated Sept. 16, 1957, in re of Criminal No. 8163, out of the U.S. District Court, Memphis, Tenn.

1. Title 28 U.S.C. Section 2255 applicably states that the Court shall make a finding of facts and conclusions of law on points raised by that proper motion—The court Order dated August 6, 1957, did not set forth a finding of facts and conclusions of law, but rather a highly abstract and prejudice ruling, a ruling which contained no appealable law, and one which would confuse, bloc*k* and frustrate any defendant that is a pauper and without legal counsel—as to what would be the proper recourse: The Court has not acted according to law, specifically 28 U.S.C. 2255, and thereby erring and making reverse*a*bie judicial errors which cannot be justified under their "Certificate" alleging that the appeal is not taken in good faith. Such a "Certificate" appears to be nothing more than a instrument that would deny due process of law to our petitioner—except under authority of duly constituted law as found in the Johnson vs. U. S., No. 531, Oct. Term, 1956, Supra, [fol. 54] which states that such a "Certificate" is not final but subject to review by the Appellate Court, etc.

2. The question presented said district court in the Motion to Correct Sentence, dated July 12, 1957, was that petitioner was illegally indicted and sentenced because (1) the sentence for possession (Title 18 Sec. 2313 U.S.C.) and transporting (Title 18 Sec. 2312 U.S.C.), 5 years on each, consecutively, constitute double jeopardy. The sentence is illegal in that petitioner could not have transported the stated car without having been in possession of same. The petitioner alleges that the cited statutes were not written into law for purpose of *double jeopardy* but merely for the purpose of prosecution on one or the other depending upon the statute most applicable to the evidence and offense. The spirit of this law and reasoning is setforth in Ollie Prince vs. U. S., Supra, No. 132, Oct. Term, 1956.

Prayer

Your petitioner prays, in view of provisions to be found in 28 U.S.C. 2255, 28 U.S.C. 1915, Johnson vs. U. S., Supra, No. 531, Oct. Term, 1956, that the court allow petitioner to file the Motion to Remand, dated Sept. 16, 1957, in forma pauperis, as a matter of *right by law*, for reason that the U. S. Attorney's rebuttal to motion for leave to file and proceed in forma pauperis is without merit, contrary to

due process of law and duly constituted provisions laid down by the U. S. Supreme Court.

Respectfully submitted, BILLY G. WOODY, Petitioner.

Oath of Verification:

I, Billy G. Woody, petitioner herein, deposes and says the foregoing is true in all it's parts.

[fol. 55] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BILLY G. WOODY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

Order denying motion for leave to proceed in forma pauperis and to remand—Filed October 10, 1957.

This is an application for leave to appeal in forma pauperis from an order of the District Court for the Western District of Tennessee, denying a motion to correct sentence, filed under the provisions of 28 U.S.C.A., § 2255. There is also before the court a motion to remand the case to the district court for findings of fact and conclusions of law. The district court has certified in writing that the appeal is not taken in good faith, and an independent examination fails to disclose that this certification was unwarranted. 28 U.S.C.A., § 1915, *Johnson* v. *United States*, 352 U.S. 565 (1957).

The petitioner was indicted, convicted, and sentenced to two consecutive five year terms of imprisonment for violations of the provisions of 18 U.S.C.A., §§ 2312 and 2313. The motor vehicle which he was convicted of transporting in violation of Section 2312 was the identical motor vehicle which he was convicted of receiving and concealing in viola-

[fol. 56] tion of Section 2313, and the petitioner contends that his conduct constituted but one offense, punishable by a maximum total of five years imprisonment. The law in this circuit has long since been settled contrary to the petitioner's contention. *United States* v. *Spradley*, 65 F. Supp. 136, aff'd. 162 F. (2d) 203 (6 Cir., 1947); *York* v. *United*

States, 299 Fed. 778 (6 Cir., 1924); *Crawford* v. *United States*, 214 F. (2d) 313 (6 Cir., 1954); *Austin* v. *United States*, 224 F. (2d) 273 (6 Cir., 1955), cert. den. 350 U.S. 865. This is also the conclusion that has been unanimously reached in every federal court where the precise question has arisen. *Chrysler* v. *Zerbst*, 81 F. (2d) 975 (10 Cir., 1936); *Jackson* v. *Hudspeth*, 111 F. (2d) 128 (10 Cir., 1940); *Record* v. *Hudspeth*, 126 F. (2d) 215 (10 Cir., 1942), cert. den. 316 U.S. 703; *Lindsay* v. *United States*, 134 F. (2d) 960 (10 Cir., 1943), cert. den. 319 U.S. 763; *Doll* v. *Johnson*, 95 F. (2d) 838 (9 Cir., 1938), cert. den. 304 U.S. 574; *United States* v. *Runion*, 47 F. Supp. 594 (E.D.Ky., 1942); *United States* v. *Dye*, 61 F. Supp. 457 (W.D. Ky., 1945).

The Supreme Court's recent decision in *Prince* v. *United States*, 352 U.S. 322 (1957) is inapplicable, since that decision was expressly confined to interpretation of a quite different statute, the Federal Bank Robbery Act, 18 U.S.C.A., § 2113.

Leave to appeal in forma pauperis is therefore denied. The motion to remand is also denied, for the reason that the facts relied upon are not in dispute and were fully disclosed by the motion and the files and records of the case in the district court. 28 U.S.C.A., § 2255.

Approved for entry:

(S.) Potter Stewart, United States Circuit Judge.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES,

October Term, 1957

No. 290 Misc.

BILLY G. WOODY, Petitioner,

vs.

UNITED STATES OF AMERICA

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 30, 1958

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1102 and assigned for argument immediately following No. 591.

[fols. 1-4] In the United States District Court for the Western District of Tennessee, Eastern Division

Number 8163 Criminal

United States of America

vs.

Billy Gene Woody, Sr.

Transcript of Hearing—June 23, 1954

Be It Remembered that the above styled cause came on to be heard on the 23rd day of June, 1954, in the District Court of the United States for the Western District of Tennessee, Eastern Division, at Jackson, before the Honorable Marion S. Boyd, Judge, presiding, and a jury duly and regularly impanelled and sworn, when and where proceedings were had and evidence was introduced, as follows:

Appearances:

For the Government: Warner Hodges, Assistant United States Attorney.

For the defendant: Perry Harbert, Esq., and P. O. Maddox, Esq.

[fol. 5] Afternoon Session, June 23, 1954

The trial of the case was resumed at one-thirty o'clock P. M., pursuant to adjournment, as follows:

The Court: All right, who do you have as the first witness in this case on trial, Mr. District Attorney?

Government's Proof

Thereupon the Government, in support of the indictment, introduced evidence as follows, to-wit:

Mr. Hodges: Mr. Long.

Coy Loxo, the first witness, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Hodges:

Q. Tell the Court and jury your name, please, sir.
A. Coy Long.
Q. Mr. Coy Long. Where do you live, Mr. Long?
A. 1115 Texas Avenue in Texarkana, Texas.
Q. Texarkana, Texas?
A. Yes, sir.
Q. Texarkana straddles the Arkansas and Texas line?
A. Yes.
[fol. 6] Q. Is that correct?
A. Yes, sir.
Q. Back during March—back during February and the first part of March of this year, '54, did you own an automobile?
A. Yes, sir.
Q. What kind of automobile did you own?
A. A '52 Roadmaster Buick.
Q. A '52 Roadmaster Buick?
A. Yes, sir.
Q. Was that a Riviera or Roadmaster?
A. Riviera, yes, sir.
Q. Is that the hard-top convertible type?
A. Yes, sir.
Q. What color was this car?
A. Yellow body and black top.
Q. Yellow body and black top?
A. Yes, sir.
Q. What kind of license plates did it have on it?
A. '54 Texas license.
Q. '54 Texas license plates on it?
A. Yes, sir.
Q. And you are here today under subpoena?
A. Yes.
Q. Do you know the defendant, Billy Gene Woody, Sr.?
A. No, sir.
[fol. 7] Q. Ever see him before this in your life?
A. Except at the hearing.
Q. Well, that was the preliminary hearing?
A. Yes, sir.

Q. But prior to that time you had never heard of him——
A. No, sir.
Q. (Continuing)—Before in your life?
A. No, sir.
Q. You never lived at Savannah, Tennessee, or anywhere near there?
A. No, sir.
Q. You know nobody here?
A. No, sir.
Q. All you know, you had a car stolen?
A. That is right.
Q. And you were subpoenaed up here today, is that correct?
A. Yes, sir.
Q. Were you advised by law enforcement officers of the recovery—, of the recovery of your automobile?
A. Yes, sir.
Q. Where did they tell you it was?
A. At Savannah, Tennesse.

Mr. Harbert: We except, if Your Honor please, to any information he has had about it and what somebody said where the car was.

[fols. 8-9] The Court: Well, I take it there is no controversy about that, but the objection is sustained.

[fol. 10] Q. Do you have your bill of sale with you?

A. Yes, sir.
Q. For your automobile? May I have it, please, sir?

Mr. Hodges: May I approach the witness, Your Honor? Well, here is the Marshal.

Thank you, Mr. Marshal.

(Document examined by counsel.)

Do you wish to examine the title, and so forth?
Mr. Maddox: Yes, sir.

(Documents examined by counsel for the defendant.)

Q. I hand you your car invoice, which is dated October 10, '52, and your certificate of title from the State of Texas, and ask you to identify those for us, please, sir.
Is that the certificate of title for your automobile?
A. Yes, sir, it is.

[fol. 11] Q. And the invoice received from the motor company where you bought the automobile?

A. Yes, sir, it is.

Q. You bought this car, when you bought it new, bought your car?

A. Yes, sir.

Q. Traded in another car on it?

A. Yes, sir.

Q. The motor number is on your car invoice there?

A. On the invoice? Yes, sir.

Mr. Harbert: A little louder, please, Mr. Long, we can't hear you.

Mr. Hodges: He said "Yes, sir", Mr. Harbert.

Mr. Harbert: Thank you.

Q. Then read it off for us.

A. 46633100.

Q. Will you make that a Collective Exhibit 1 to your testimony? I wish to introduce it in evidence.

Just say "Yes" and let the court reporter mark it there.

(Said documents were accordingly marked as Collective Exhibit 1 to the testimony of Mr. Long, and same were filed with the exhibits in the cause.)

[fol. 12] Q. Did your automobile have any distinguishing features as a result of a slight collision?

A. Yes, it did.

Q. Tell the Court and jury what that was, please, sir.

A. The right rear fender was bent, and the chrome molding on the right side was bent.

Q. What kind of bend was that on the right rear fender?

A. Just a bunged sunk-in place where the bumper had hung.

Q. Just a bunged sunk-in place where the bumper had hung?

A. Yes, sir.

Q. Just a little spot?

A. No, a big sunk-in place.

Q. What about the bumper?

A. The right rear bumper—was a sunk-in place underneath.

Q. Right rear bumper?

A. Right rear bumper?

Q. Sunk-in place underneath?
A. There was a cut place right underneath.
Q. There was a cut place underneath the bumper?
A. Yes, sir.
Q. And you say the car did have Texas tags on it?
A. It did, yes, sir.
Q. At the time it was stolen, do you remember what number that was?
[fol. 13] A. Yes, sir.
Q. What number was it?
A. HY 821.
Q. HY 821?
A. Yes, sir.
Q. What was the condition of the paint on your car?
A. The paint was perfect condition except that bent plant on it.
Q. What day was this car stolen, now?
A. Second day of March.
Q. Were you using the car that day?
A. No, sir.
Q. Well, who was using it?
A. My wife was.
Q. Your wife was?
A. Yes, sir.
Q. Did she use it to go to the picture show and take her mother?
A. Yes, sir.
Q. And she took the car to a picture show, is that correct?
A. Yes, sir.
Q. And it was stolen while there?
A. Yes, sir.
Q. March 2nd?
A. Yes, sir.
Q. Did you report the car stolen at the same time?
[fol. 14] A. She did.
Q. She did. She immediately called you and——?
A. She did not get hold of me that day; I mean, not that night.
Q. Prior to the car being stolen, were the locks on the doors and on the trunk, Mr. Long, locking all right?
A. Yes, sir.
Q. How many keys did it take to operate the doors, ignition, and lock the trunk?

A. The ignition key fitted every lock on the car, that is correct.

Q. One ignition key fitted every lock on the car, is that correct?

A. Yes, sir.

Q. How many keys did you have to this car?

A. Two.

Q. How many keys did you turn over to the insurance company?

A. Two.

Q. Your wife had both keys in her purse?

A. Yes.

Q. And turned back to the insurance company?

A. Yes.

Q. And that is the key to operate the lock on the glove compartment, the ignition key, and the doors? It was a hard-top convertible two door. And the trunk on the rear?

[fol. 15] A. That is right.

Q. What did you have in this car prior to being stolen, just prior to being stolen on March 2nd?

A. Personal?

Q. Yes, sir. Not talking about radio or heater, but any sort of personal business.

A. I had my Army discharge, a picture of myself and my wife, and driver's license, and a few wrenches scattered in the back, thermos jug, and Army wool blanket on the front seat.

Q. O. D. color, is that right?

A. Yes.

Q. Army wool blanket?

A. Yes.

Q. In the back end of this car, the back of the front seat or the trunk compartment, did you have any big type of tank?

A. No, sir.

Q. Say, a tank about this large and about that big around?

A. No, sir.

Q. Something like that?

A. No, sir.

Q. Didn't have anything like that?

A. No, sir.

[fols. 16-19] Mr. Hodges: Take the witness.

[fol. 20] Mrs. Coy Long, the next witness, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Hodges:

Q. You are Mrs. Coy Long?
A. Yes, sir.
Q. Mrs. Long, your home is in Texarkana, Texas?
A. Yes, sir.
Q. You are up here today under subpoena?
A. Yes, sir.
Q. The Government subpoenaed you up here, you know nothing about this lawsuit other than—of your own knowledge?
A. No.
Q. Your husband owned a '52 Buick Riviera?
A. Yes, sir.
Q. And I believe on the night of March 2nd you and your mother went to the show in that car in Texarkana, Texas?
A. Yes, sir.

Mr. Harbert: Now, if Your Honor please, I don't think the solicitor for the Government should be leading the witness.

The Court: All right, don't lead her.

Mr. Harbert: It is not proper to have the leading questions, and we except.

[fol. 21] Q. Tell us what happened, Mrs. Long?
A. Well, I went to the show and parked the car. Is that what you want to know?
Q. Yes, ma'am; just what happened.
A. Well, bought my ticket and went in. And when I come back the car was gone.
Q. What time of day was this, now?
A. I parked the car around seven o'clock, seven P. M.
Q. On March 2nd?
A. March 2nd.
Q. All right, ma'am.
A. (Continuing) And then I came back about ten-thirty; the car was gone.

Q. What was the color of this car?

A. Yellow bottom with a black top.

Q. Was it what you call a hard-top convertible?

A. Yes, sir.

Q. What condition was the paint of this car?

A. It was good. It had a dent in the right fender, back fender or bumper.

Q. Now, how many keys did this automobile have?

A. Two.

Q. Got two keys when you bought the car, is that correct?

A. That is right.

Q. Now, what locks on the car did these keys operate?

[fol. 22] A. All of them; the same key operated it all.

Q. The two keys you had, were they identical keys or unidentical keys?

A. Yes, sir, they had the same number of them.

Q. They were identical keys, each one opened the same lock?

A. Yes, sir.

Q. And they all opened all the locks on the car?

A. It opened all the doors and back and all of it, yes, sir.

Q. When you parked the car, did you lock it?

A. No.

Q. Did you take the key out of the ignition?

A. Yes, sir, definitely. I had both keys. And it was definitely not locked.

Q. And you reported the car stolen after you came back out of the theater, is that correct?

A. Yes, sir.

Q. And you and your husband turned the two keys over to the insurance company, is that correct?

A. Yes, sir.

Q. Was the trunk compartment locked at the time you parked the car there?

A. Yes, sir, it automatically locks when you push it down, it locks it.

Q. When you slam it down, it automatically locks?

A. Yes, sir.

[fol. 23] Q. You parked it, I believe,——

A. Yes, sir.

Q. (Continuing)—Near the picture show there?

A. Yes, sir.

Q. At Texarkana, Texas?

A. No, it was on the Arkansas side.

Q. Oh, you had gone over?

A. Yes, sir.

Q. The state line goes right through the middle of town, does it not?

A. Yes, sir, it kind of angles through town.

Q. But you parked your car in Texarkana and happened to be on the Arkansas side rather than the Texas side near the picture show, is that right?

A. Yes, it was on the Arkansas side.

Q. The only time you have ever seen the defendant, Billy Gene Woody, here, was at the preliminary hearing when you came up with your husband, is that correct?

A. Yes, sir, as far as I know.

Q. You know nothing about this lawsuit other than what you have testified to; is that a correct statement? Of your own knowledge, I mean?

A. No, sir, I don't.

Mr. Hodges: Take the witness.

[fol. 24] Cross-examination.

By Mr. Harbert:

Q. Did you make a statement here to some of the FBI men that you saw this defendant in Texarkana?

A. I did not say I say that defendant; I said it was a boy.

Q. A boy?

A. Standing there waiting on us to buy the ticket. He was kind of hanging about, don't you know. I didn't say it was he, because I can't remember that.

Q. You don't remember ever seeing this defendant here before in your life?

A. No; I did not see that boy in the face that night.

Q. And you say there was a dent in your car. Was it a very large dent? Right fender, I believe,—right fender?

A. Well, a bumper did it. It started on the door and just barely scratched it, kind of tore the back fender there, scraped the bumper a little bit.

Q. It was such that it really needed repairing, was it? It was such that it really needed repair and a point job on it, wasn't it?

A. No. Well, it needed repairing, yes, sir.

Q. Be all right like it was?

A. Well, we drove it like it was.

Q. You drove it like it was, but it didn't need any paint, it was in good shape, you say?

[fols. 25-26] A. The paint was not knocked off. The bumper did it. It was down low.

Q. I understand the bumper did it. But it scraped the paint off, didn't it?

A. No.

Q. Some paint?

A. Well, probably some of it.

[fol. 27] Mr. Harbert: Wouldn't think so. That is all.

Redirect examination.

By Mr. Hodges:

Mr. Hodges: I would like to ask the defendant to stand up to see if she can identify him.

[fol. 28] Stand up, please.

(The Defendant stands as requested.)

Q. Get a good look at him, Mrs. Long.

Tell us who you saw loitering around the car that night that excited your suspicion to a mild extent. Just relate what happened.

A. Well, the boy I saw, he was ahead of me, wasn't around the car; he was up in line at the ticket office at the show.

Mr. Hodges: yes, ma'am.

A. (Continuing) Well, he could have easily bought a ticket before I bought a ticket in line with my mother, but he did not, he kind of hung back until after we bought the tickets.

Q. Was he near to where you parked the car?

A. No, he was coming the opposite direction by the theater there, about middle-ways of the block, you see, and I parked about middle-ways of the theater and the corner.

Q. I see. And you say he sort of hung back. Did he go up to the ticket window there?

A. After I bought my tickets, yes; he did go up to the ticket office, yes. I don't know whether he bought a ticket or not. I suppose he did. And I never saw him any more.

Q. You thought his behavior at that time was slightly unusual insofar as you remember it?

A. Yes.

[fol. 29] Mr. Harbert: If Your Honor please, we except to leading this witness.

The Court: Don't lead the witness.

Q. All right. Take a good look at this man. Does he look anything like the man you saw there that night?

A. Well, I say he was about that size. He had on a coat. He might have been a little bit heavier. But I can't remember seeing him in the face.

Mr. Harbert: Seeing him in the what?

A. Seeing him in the face that night.

Q. When he stands up, does he stand with about the same erectness or slouch of the man you saw?

A. The man I saw sort of stood there kind of drooped looking some way or other.

Q. State that——

A. Kind of drooped. I don't know, did not see him in the face standing there. I was not really paying any attention, I suppose.

Mr. Hodges: All right.

Recross examination.

By Mr. Harbert:

Q. You testified before the Commissioner in this case, Mrs. Long? You testified before the Commissioner, Mr. Adams, up at Selmer a few weeks ago?

[fol. 30] A. Yes.

Q. You were very positive when he asked you, you never had seen this defendant?

A. I said I never saw him in the face. I am still saying I never saw him in the face.

Q. You said you never saw this defendant before, hadn't you? He was there and he was shown you——

Mr. Hodges: If the Court please, she never said—, defense counsel opened this up, not my examination. I was willing to pass it up.

The Court: The witness is not undertaking to identify the defendant at this time as being the person she saw at the ticket window there at the theater in Texarkana. I say, she is not undertaking to identify your client at this time, Mr. Harbert.

Mr. Harbert: All right, that is all.

Mr. Hodges: That is all, Mrs. Long.

(Witness Excused.)

Mr. Hodges: Mrs. Kate Brynes.

[fol. 31] Mrs. Kate Byrnes, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. You are Mrs. Kate Byrnes?

A. Yes.

Q. Mrs. Byrnes, where do you live?

A. Tuscumbia.

Q. What is your occupation there?

A. I am a clerk in the Tax Assessor's office.

Q. How long have you been employed in that capacity, Mrs. Byrnes?

A. Twelve years.

Q. Twelve years. You know nothing about this lawsuit other than your records disclose, essentially, is that true?

A. That is right.

Q. You were subpoenaed up here by the Government?

A. Yes, Sir.

Q. The Government asked you to bring your book up here showing automobile assessments for 1953 and '54.

I ask you to refer specifically to number 589997, please, ma'am, in your book.

Incidentally, the writing on that page there, is that [fol. 32] your handwriting?

A. Yes, sir.

Q. You recognize it as your handwriting, is that right?

A. Yes, sir.

Q. Do you remember the man sitting over here in the blue shirt with no tie on?

A. No, sir, I don't.

Q. You say you are from Tuscumbia?

A. Yes, sir.

Q. That and Sheffield are really right together there, aren't they?

A. Two miles.

Q. Two miles apart. It is a fairly heavily populated area that you work in up there?

A. Sheffield is in Colbert County.

Q. Ma'am?

A. Sheffield and Tuscumbia both are in Colbert County.

Q. Yes, ma'am. A lot of people come in your office?

A. Yes, sir.

Q. And you have no particular reason to know who they are by their faces?

A. Oh, no.

Q. Under Alabama law, I believe before a man can obtain a license he has to show that there is no assessment due [fol. 33] on the automobile, is that true?

A. Yes, sir.

Q. If an automobile was brought it from out of state, say Tennessee, then no assessment would be due, is that right?

A. No tax is due.

Q. No tax is due. And a person desiring to purchase an Alabama license for an automobile has to show that the tax is paid, if one is due, or if none is due they have to have a non-taxable certificate issued by your office, is that correct?

A. Yes, sir, we call this ——

Mr. Harbert: If Your Honor please,——

A. (Continuing)—Assessment sheet.

Q. Assessment sheet?

A. Yes, sir.

Mr. Harbert: If Your Honor please, we except to this. First, it is leading. And next, the law itself would be the best evidence, instead of the Attorney General telling the witness what the law is.

The Court: Well, the question is a little leading. But this witness is employed as a clerk in the Tax Assessor's office. And it is more or less routine, I take it, for these [fol. 34] things the District Attorney is inquiring about at this time.

Mr. Hodges: Yes, sir.

The Court: Of course, it is for the Court to pass on any legal questions. But this is not in controversy in this lawsuit, is it, Mr. Harbert, this particular proposition?

Mr. Harbert: I don't know; what is going to be relied upon; but they are attempting——

Mr. Hodge: We are going to show here, Mr. Harbert, that Billy G. Woody, who is your client, got a non-taxable certificate from this lady's office on March 3rd.

Do you deny that? If you do, we will— –

The Court: Well, she will be permitted to testify to what a non-taxable certificate is in the State of Alabama. And if that is the point, the Court will let her do that.

The objection is overruled to that extent. All right.

Mr. Harbert: And defendant excepts.

Q. Tell us on that number that I previously read off to you,—the paper, what you term it, what that shows, and explain to the Court and jury—we are not residents of Alabama, and explain what it means, please, ma'am.

A. Well, Billy Woody came in March 3rd and——

[fol. 35] Q. 1954?

A. '54, to assess a '54 Buick, and he said it was a Roadmaster. You want me to read the motor number?

Q. Yes, ma'am. Read it all.

A. Motor number 68799957. And——

Q. All right, at that point,—excuse me. You never did see this automobile?

A. Oh, no.

Q. This man just told you that?

A. Yes.

Q. In your office?

A. Yes.

Q. You never went out of the office to look at any car?

A. Oh, no; no.

Q. He came in, told all this. is that correct?

A. Yes, sir.

Q. And you just sat there, wrote it down?

A. Yes.

Q. Go right ahead.

A. I had to say, "Did you buy it new or used?"

He said "Used." I said, "When?" He said, "February 28, 1953."

Q. Over a year ago, now, is that correct? This is 1954.

A. He bought it February 28, 1953, from Harold Hubbard.

[fol. 36] Q. Harold Hubbard?

A. And I said, "Where does Harold Hubbard live?" And he said, "Savannah, Tennessee."

Q. And you took this from him in '54, this year, is that correct?

A. Yes, March 3rd, '54.

Mr. Hodges: Yes, ma'am.

A. (Continuing) Had Tennessee tag number 56 D-281.

Q. It had Tennessee tag number 56 D-281, is that correct?

A. Yes, sir.

Q. Now, did this Mr. Woody that came in there sign this?

A. Did he have to sign this?

A. Well, he—yes, sir, he has to sign the assessment.

Q. How did he sign it there?

A. Billy G. Woody.

Q. Tell us whether or not he informed you that this car was then in Alabama?

A. Well, I had to ask the question, "When was this car brought to the State of Alabama?" He said, "March 3rd, 1954."

Q. Before you issue Alabama licenses on a car, the person has to tell you that the car is in Alabama and will remain in Alabama, is that correct?

A. Well, it has to be assessed before he can go in the [fol. 37] Judge's office and buy the license.

Q. What I mean is, a person living in Tennessee, you don't sell them an Alabama license just because they bring a car into Alabama from Tennessee that one day, do you?

A. Well, I don't know if I know what you mean.

Q. I mean, a person with Alabama license is normally a resident of Alabama, is that right?

A. No, other people can buy a license in Alabama whether they are residents in Alabama or not.

Q. What does the law in Alabama require in that regard?

A. Well, requires out-of-state tags normally.

Q. What I mean, if a visitor is coming into Alabama, he does not have to buy an Alabama tag, is that true?

A. Well, he is allowed so many days before he does have to buy Alabama tag.

Q. How many days is he allowed?

A. Well, I would not answer that, because it comes under the judge's responsibility.

Q. What I am getting it, ordinarily, the law in Alabama does not require—an ordinary visitors does not have to have Alabama tag?

A. I think the law requires the day he goes to work he has to buy Alabama tag.

[fol. 38] Q. That is what I mean, the day he starts living there.

A. Yes.

Q. What address did he give, please, ma'am?

A. Sheffield.

Q. Sheffield, Alabama?

A. Yes.

Q. By the way, down here, where it says "Tax Assessor", it says, "Charles Thigpen", the writing there, Mr. Thigpen, right there.

A. I know.

Q. You signed his name as Tax Assessor?

A. Yes. I am Deputy.

Q. And he asks the questions, fills it out?

A. Yes.

Mr. Hodges: I would like the record to show that that page is affixed in this book, sticking in this point.

I want to introduce it in evidence. And I believe——

A. No. It is just in there like the rest of the pages.

Mr. Hodges: May I see it?

Mr. Harbert, do you want to see this, please, sir?

[fol. 39] Mr. Harbert: Yes, sir.

(This examined by counsel.)

Mr. Hodges: I would like to have this marked as an Exhibit 1 to the witness' testimony, and ask for leave in case

the witness is desirous to later substitute a photostat. I do not wish to mix up the records down there.

The Court: All right, it may be handled in that way.

Mr. Harbert: Yes, sir. If the Court please, we agree that any photostatic copy may be filed here if they want to. (Said document was accordingly marked as Exhibit 1 to the testimony of Mrs. Byrnes, and same was filed among the exhibits in the cause.)

Mr. Harbert: And it is apparent that this is a carbon copy. I don't know where the original is.

Q. Well, the original is furnished the applicant, is it not?

A. The original is in the Judge's office. And I think Miss Wesley Williams has that today. We never have, the [fol. 40] Judge keeps the original.

Q. I ask you to refer back to the exhibit to your testimony, the bottom form, it is entitled Affidavit of Operator for Vehicle Licensed on Declining Basis, and ask you if it is not at the bottom thereof, signed Billy G. Woody?

A. Down here?

Q. Down at the bottom, I mean.

A. No, sir, it is not. If he had signed that, he would have signed this down here in the Judge's office, not in our office.

Q. I see. In other words, you gave him the original, keeping the carbon copy, which has been made exhibit to your testimony, is that right?

A. That is right.

Q. And he signs the original at the bottom in the Judge's office when he gets the license plates?

A. Well, I wouldn't say, sir, but from there down it does not concern our office.

Q. I see. That is still out in another office?

A. Yes, sir.

Mr. Hodges: All right.

Take the witness.

[fol. 41] Mr. Harbert: If Your Honor, please, we interpose the exception to what this witness said about this, because that is a carbon copy, so the original would be the proper matter of evidence.

The Court: As I understood her testimony, she says that is an original record in her office, and another part of

it goes to the Judge. And there is a witness here who has the other part, which is the original of this.

Am I correct about that?

A. Yes, sir.

Mr. Harbert: We say the original would be the best evidence.

The Court: Well, she says there is a party here who has that original.

And you propose to introduce that party, do you, Mr. District Attorney?

Mr. Hodges: Yes, Your Honor. It will be introduced in evidence.

The Witness: I did not know.

Mr. Hodges: But I am using that. That is her record. That tells her what——

[fol. 42] The Witness: The white sheet belongs to the Probate Judge, and we keep the yellow.

Cross-examination.

By Mr. Harbert:

Q. Mrs. Byrnes, I believe you stated at the beginning of your testimony that you did not meet William G. Woody, you never had seen him before, and said not that I remember of, didn't remember whether I saw Billy G. Woody? You don't remember anything about when he was in the office, do you, to identify him any way?

A. No, no more than according with this record.

Q. That record is all you have to identify him. But you can't identify him?

A. No, sir, I will not identify him as Billy Woody.

Q. You don't know whether this defendant here was the man who signed up for this or not?

A. No, sir, I don't.

Q. You can't say if Woody—if you had ever seen the defendant here before, you did not know him?

A. Well, I assess—I guess—see, in the office, rather, about twelve thousand motor vehicles a year, and I could [fol. 43] not identify everybody.

Q. I know. But I said, if you had see him before you don't recollect?

A. No, sir.

Q. Nothing to impress it upon you?
A. No.
Q. Do you recollect how many came in there at the time that was signed up, how many people in your office?
A. No, sir, I don't.
Q. You don't know whether somebody else was with the one that signed that or not?
A. No, sir.

Mr. Harbert: Anything else?
That is all.
Mr. Hodges: Thank you very much, Mrs. Byrnes.

(Witness is excused.)

Mr. Hodges: Miss Wesley Williams.
The Court: Now that record, Mrs. Byrnes, will have to remain here for a short time. They will send it back to you after a photostat has been made, if it becomes necessary.
All right, the next witness, Gentlemen.

[fol. 44] Miss Wesley Williams, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. Will you tell the Court and jury your name, please, ma'am?
A. I am Miss Wesley Williams.
Q. Miss Williams?
A. Yes, sir.
Q. Will you raise your voice a little bit, so we can hear you?
A. My name is Wesley Williams.
Q. Where do you live and work, Miss Williams?
A. I live at Tuscumbia, Alabama. I work in the Probate Judge's Office in Tuscumbia.
Q. Were you working there in March of this year, 1954?
A. I was.
Q. I will hand you here the original of this assessment tax receipt and tag application for fifty-three and fifty-

four. The number on it is fifty-nine five eight nine nine nine seven 59-589997, and ask you if you can identify that, [fol. 45] please, ma'am?

A. I do.

Mr. Hodges: Mark that as Exhibit 1 to the testimony of the witness here, please.

(This said document was accordingly marked as Exhibit 1 to the testimony of Miss Williams, and same was filed among the exhibits in the cause.)

Mr. Hodges: And let me have it as soon as you mark it.

The Court: Is that the original of the document Mrs. Byrnes put in evidence?

Mr. Hodges: Yes, sir, that is the original.

The Court: Then we can let Mrs. Byrnes have her book back, can we, at this time?

Mr. Hodges: Unless counsel here wants to make some dispute of it. I don't know whether they will admit that that was signed by this defendant. And it might be necessary to keep it at this stage of the proceedings.

Mr. Harbert: Your Honor, we are not admitting that he signed it.

Mr. Hodges: That is what I said.

[fol. 46] Mr. Harbert: I make no question otherwise about it, but we are just not admitting anything about it.

Mr. Hodges: Mr. Harbert is now examining the original.

Is it getting everything in the soundscriber there?

Q. I will now hand you your Exhibit 1 to your testimony, Miss Williams, and tell us how, in your own words, how your office gets that? And what happens to it, what name is on there, just tell us about it.

And speak out now, so everybody can hear you.

The fans in here are making noise.

A. In issuing tags, they appear in the Tax Assessor's office, and assess the properties, I mean, assess the tag by giving the information, the make and model, motor number, and name, and who they purchased the car from, and several different questions, and it is answered on here.

Mr. Harbert: If Your Honor please,——

Ask her——

Mr. Harbert (Continuing): If Your Honor please, I am [fol. 47] sorry to interrupt, but I can't hardly hear this witness.

The Court: Yes. Well, the document speaks for itself there, I believe. Do you want her to read it all?

Mr. Hodges: No, sir. I want to ask primarily about the last part on there.

Q. After it is determined by the other office in your building whether or not an assessment is due, it is paid, then the document is brought to your office, is that correct?

A. At first, after it leaves the Tax Assessor's office, they go across the hall to the Tax Collector.

Mr. Hodges: Yes, ma'am.

A. (witness continuing) and leave the pink sheet in there.

Mr. Hodges: Yes, ma'am.

A. (continuing) If there is tax due, they pay the tax due on the car in that office. There was no tax due on this.

Q. There was no tax when the car was brought from Tennessee, is that right?

A. No tax.

Mr. Hodges: All right.

[fol. 48] A. (witness continuing) —Then he come and left the pink sheet, and then he come to the Probate Office for the tag.

Q. The applicant leaves the pink sheet in there and comes to your office, now?

A. The Probate Judge's Office, where I work.

Q. I notice at the bottom the signature B. G. Woody there, is that correct?

A. Yes.

Q. What is the purpose of that? Tell us what happened in your office.

A. Well, he signed that it had not been using the highways of Alabama, and had just been brought in from another state.

Mr. Hodges: I see.

A. (continuing) —That is the reason there was no tax due on it.

Q. What else happens in your office besides this?
A. He applies for a tag to put on the car.
Q. You mean by tag, you mean Alabama license plate?
A. Yes, sir, Alabama license plate.
[fol. 49] Q. Which is affixed to his car, is that correct?
A. That is right.
Q. After filling that out, did he purchase the Alabama license there in your office at that time?
A. Yes.
Q. You have your books there. Do you have in your books—I believe the subpoena required you to bring your books showing license sold to Billy G. Woody. Do you have that with you?
A. I have it.
Q. May I see it, please, ma'am?
If you turn to the right page there, I will appreciate it.

Mr. Hodges: Mr. Harbert, do you wish to examine it, please, sir?
Mr. Harbert: Yes, sir. Thank you.
Mr. Hodges: Right there.

(This document examined by counsel.)

Mr. Hodges: Through with it, sir?
Mr. Harbert: Yes, sir.
Mr. Hodges: All right. Thank you.

[fol. 50] Q. I want to hand you here your book for 1954. It is entitled, Passenger Motor Vehicle License Receipt, and it has got on the front of it, at which I am reading, 10301 through 10350. And I have turned to number 20-10338. That is the page on which I have turned to. And I will hand you that page and ask you to tell us what is on it, please, ma'am.
A. According to the record, Billy G. Woody was issued tag No. 20-10338.
Q. Is 20 the County number?
A. 20 is the county number.
Q. And what is the balance of the number?
A. 10338—1 dash 0 dash 3 dash 3 dash 8.
Q. For what calendar year ?
A. For the year '54.
Q. Will you mark that Exhibit 1 to your testimony, and I want to introduce it in evidence here.

Mr. Hodges: And I again would like to request permission to substitute a photostat later.

The Court: All right.

Mr. Hodges: I agree to any photostatic copy, if Your Honor, please.

[fol. 51] Mr. Hodges: Will you hand that over, Mr. Marshal?

I want to have it marked, please.

(Said copy of license receipt was accordingly marked as Exhibit 2 to the testimony of Miss Wesley Williams, and same was filed among the exhibits in the cause.)

Mr. Hodges: Mr. Harbert, we will agree some term of reading all that, to stipulate everything on there is on that, to save reading the whole document in evidence.

Mr. Harbert: Yes, sir. If you will agree that he has not —Billy G. Woody, the licensee, has not signed it.

Mr. Hodges: Let me see if he did not.

I will ask there——

Mr. Harbert: Yes, sir. We will agree to that, no name down there for the licensee at all.

Q. It is not necessary for the person purchasing the license there to sign it to acquire it, is that correct?

A. That is right.

[fol. 52] Mr. Harbert: Wait just a minute. If the Court please, we except to leading this witness.

The Court: Well, I don't think that is objectionable leading, for him to ask her if it is necessary for an applicant to sign.

I take it there is no controversy about that in this lawsuit?

Mr. Harbert: There is a controversy, if Your Honor please, pardon me, but there is a controversy that this man here signed it, I don't know who signed it, if it is signed. It is not signed, as I see it.

Mr. Hodges: She just testified, Mr. Harbert, it is not necessary for any purchaser to sign it.

Mr. Harbert: No, sir, you said it.

Mr. Hodges: No, sir, she said that.

According to her statement there, it is not necessary to sign it.

I think you are arguing, and I think it is a conclusion, sir.

(Interruption by Mr. Harbert for secretary.)

Mr. Hodges: Will Your Honor indulge me just a minute? [fol. 53] Mr. Harbert: Just going to tell you she was shifting there and not getting it.

Mr. Hodges: Well, I don't want her record.

Let me see now, Miss Williams, we will wait to begin the examination.

Mr. Harbert: I just want the Court to give her time to set the machine.

Q. I will hand you an original slip showing license number for nineteen fifty four, it is 20-10334. Hand it to Mr. Harbert first and let him look at it.

The Court: Same one as the other?

Mr. Hodges: No, Sir, it is not, different, the other one ended in eight, and this one ends in four. That is the difference. They are not the same.

I am going to go into the difference, Mr. Harbert, so I won't surprise you in any way.

Mr. Harbert: All right.

Mr. Hodges: Hand that to witness, please.

Q. I am now going into a mistake your office made, so the jury will understand it, and every human being makes mistakes.

[fol. 54] There is a number on that, now the license number that that purported to be.

A. 20-10334.

Q. And the one you just read from is 20-10338?

A. Yes, sir.

Q. In other words, that has 4?

A. Yes.

Q. And the other one has 8, the last digit, is that correct?

A. That is right.

Q. That says Billy G. Woody, is that correct, not signed by him, but written out in your office? It is the original that you have reference to, is that correct?

A. Yes.

Q. And, through some slip-up, a long line of people coming in your office, is that correct?

A. Yes.

Q. And, through some slip-up in your office, that was written on 4.

I ask it be marked exhibit, the next number, please.

[fol. 55] (Said document was accordingly marked as exhibit 3 to the testimony of Miss Wesley Williams, and same was filed among the exhibits in the cause.)

Mr. Hodges: And that one can be marked, please, the next number.

Q. Now, I hand you a copy, I hand you what purports to be a copy of the original that was just introduced to your testimony, that ends in four, again. What name does that show?

A. That was issued to C. M. McGregor, of Sheffield.

Q. These erasures there, somebody has gotten an eraser there, and through some mix-up, it was changed?

Mr. Harbert: If Your Honor, please——

The Court: Don't lead the witness. Let her tell what happened.

Q. Tell us what happened?

A. Well, I recall that we noticed after Mr. Woody had gone out that his tag did not correspond with his receipt number. We tried to contact him and could not get hold of him, and after we could not get him, we had to change our records to make it correct. The only thing that is different, [fol. 56] his receipt number needs changing to make it correct.

Q. The person to whom that was issued, that one there, the original, it was marked out in ink, and the correct number was inserted, is that correct?

A. That is correct, our records are correct.

Mr. Hodges: We will have that person here this afternoon or in the morning, Mr. Harbert. We don't want to keep anything from you, sir.

Mr. Harbert: You are not keeping anything from me.

Q. Do you recognize the name, whose name appears on there, or is there a long line of people and you don't know?

A. Well, I wouldn't recognize him, no, sir.

Mr. Harbert: How is that?

A. I wouldn't recognize him, I don't think.

Q. I would like to ask you if there is a discrepancy in the date thereof, or when those were issued?

Would you compare the dates, please, ma'am?
May I have those back, Mr. Harbert?

Mr. Harbert: Yes.
Mr. Hodges: Thank you.
[fol. 57] A. No, this is marked the 16th. That is the 16th. The records——

Q. The original there, which ends in 8, the green slip of paper——
A. Is the 3rd, 3rd of March.
Q. I understand that. But the original which the Deputy Marshal is handing there, that is different, that is given to the purchaser of the license, is it not?
A. It is.
Q. That is not a record now in your office?
A. No, it is not.
Q. When he is sold that license, he is given the original slip?
A. The original.
Q. And your office retains a carbon copy, isn't that right?
A. That is correct.
Q. We don't get that original from you, is that correct? Isn't it? The original says 16——

Mr. Harbert: If Your Honor, please, I wish he would let the witness testify, instead of testifying himself.
Mr. Hodges: If Your Honor please, I am just trying to hurry through, to show why the record is not here.
[fol. 58] The Court: Well, don't lead him.
I don't think it is objectionable, but don't lead him.

Q. All right. What date is shown on the carbon copy, please, ma'am?

The Court: Don't lead her, rather.

A. The third of March.
Q. What is shown on the original?
A. It looks like 16.
Q. What motor number appears on your carbon copy, please, ma'am?
A. 68799957.
Q. What motor number appears on the original, please, ma'am?
A. 68791050.

Mr. Hodges: I would like to pass those both to the jury, if the Court please.

And I would like first to have the second copy in the office made an exhibit to the testimony of the witness.

Not that one—the carbon in the book. Have it marked [fol. 59] the next number.

(Said copy of receipt to C. M. McGregor was accordingly marked as Exhibit 4 to the testimony of Miss Williams, and same was filed among the exhibits in the cause.)

Mr. Hodges: Pass both these to the jury, so they can examine the dates on the original and the copy, and examine the motor numbers on the original and the copy.

(Said exhibits were accordingly passed to the jury for examination.)

Q. Incidentally, I might just ask, while the jury is examining those, when you make that out the original is attached to the book, and you insert the piece of carbon between the original and the carbon copy in your book, and you write on the original?

(Witness nods affirmatively.)

Mr. Hodges: That is all.

Mr. Harbert: Did you say you are through, or are you waiting?

Mr. Hodges: I am waiting. I am not through yet.

[fol. 60] Q. Would you tell us, please, ma'am, back in March of this year, did Alabama have a title law, is that right?

A. No, they did not.

Q. Didn't have a title law, like Tennessee does on vehicles, in Tennessee you have a title law and you have to obtain a title for every vehicle?

A. Yes.

Q. Alabama didn't have that?

A. Alabama did not and does not now.

Mr. Hodges: Yes, ma'am.

Mr. Harbert: How is that?

A. Alabama did not have a title law.

Mr. Harbert: I wish you would talk just a little louder.

A. I will try, yes.

Mr. Harbert: Well, I am sorry. This record machine, I notice you shook your head a while ago. We are trying to record it, Miss Williams, and we would like to have your words, please.

Q. Will you tell us, there, I notice one carbon there with the name McGregor, or something, due to the mix-up [fol. 61] in the records. Will you tell us if you have a tax sheet there for McGregor?

A. I do have.

Q. Will you show us that, please?

A. Yes, sir.

Q. May I see it?

Here you are, Mr. Harbert.

Mr. Harbert: Thank you.

(Document examined by the counsel.)

Mr. Hodges: That is not your client.

That is a resident of Alabama, sir.

Mr. Harbert: It is a Ford, too.

Mr. Hodges: Sir?

Mr. Harbert: I say, that suffices for a Ford car, too.

Mr. Hodges: That is for a jury to determine.

Q. Does that tax assessment sheet you now have in your hand correspond to the carbon copy of McGregor, which you showed us a moment ago?

A. It does. It does.

Q. That is for a Ford automobile, not a Buick automobile, is that correct?

A. Yes.

[fol. 62] Q. Does the carbon copy likewise show it involved a Ford automobile?

Would you look and see if you don't have it here, too, and turn it over, Mr. Marshal.

Mr. Harbert: That is not the carbon she had.

A. It is a Ford.

Q. It is a Ford?

A. Yes.

Q. Mr. McGregor, who is a resident of Alabama, you don't know him, do you?

A. I do not.

Q. And the original of his, the last number was changed to the other digit, is that correct?

A. That is correct.

Q. Instead of the one you issued?

A. Just to make the record straight.

Q. But Mr. Woody left so fast you were unable to catch him to change it, is that correct?

Mr. Harbert: Now, if the Court please, we except to that, because the witness hasn't identified Mr. Woody, the defendant.

[fols. 63-72] Q. The Mr. Woody, who signed that, we are talking about?

A. That is right.

Q. The Mr. Woody who signed this, he left so fast you were unable to catch him, to identify him, is that correct?

Mr. Harbert: If Your Honor please, it is leading, suggestive,—Let the witness testify.

The Court: The objection is overruled. I think we have been over this already, haven't we?

Mr. Hodges: Yes, Sir, I think so.

[fol. 73] Mrs. Mary Ann Woody, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. Will you tell the Court and jury your name, please, ma'am?

A. Mrs. Mary Ann Woody.

Q. Mrs. Mary Ann Woody? Now, Mrs. Woody, speak up. There are fans going on in here, and I want the Court [fol. 74] and the jury and everyone to hear you.

Q. Now, your husband is the brother of Billy G. Woody, this defendant here, is that correct?

A. Yes, sir.

Q. And when were you and your husband married?

A. Second of April, 1954.

Q. Now, you lived at Savannah at that time, is that correct?

A. Yes, sir.

Q. Now, when, to your knowledge, did Billy Woody, sitting over here, first return to Savannah in this year?

A. Well, in February.

Q. Do you remember about what day that was?

A. It was about the 24th or 25th.

Q. Now, how or with whom, who did he come with, if you remember?

A. No, sir, I don't know the boy's name. He has a pickup truck.

Q. Well, he came with some man unknown to you, is that right?

A. Yes.

Q. Did he come in a car or train or on a bus, or how did he get there.

A. He was in a pickup truck.

[fol. 75] Q. Do you remember the color of it?

A. Green color.

Q. Green color pickup truck. Do you remember what kind of license the truck had on it?

A. Texas.

Q. It had a Texas license plate on it? And how is it that you happen to remember that he was at Savannah, Tennessee, about February 24th, or around that period?

A. Well, it was around there.

Q. I mean, how about—was there anything that made that date sort of stick in your mind?

A. Well, my future husband then was in Colorado going to engineers school.

Q. Was he in the armed forces?

A. Armed forces, yes, armed forces.

Q. Did he get a three day pass and come home?

A. No, sir, he started back to Washington to Andrews Air Force Base where he is stationed now, and he came in around the 26th.

Q. Around the 26th of February, he came in?

A. Yes.

Q. From Colorado enroute to Washington, is that correct?

A. That is right, and——

[fol. 76] Q. Well, when did your future husband arrive, you say now?

A. He arrived home about the 26th.

Q. And your future husband remained in Savannah, how long?

A. Three days. He got in Friday morning about four o'clock and left Sunday morning at eight o'clock.

Q. Was that the 26th?

A. Yes, sir.

Q. Now, did you know,—for instance, did you know that Billy Woody was over at his daddy's home on or about the 24th? Is that the day you say he was there?

A. Well, I did not know he was there until my husband came there, and one of the men from Walkertown up there where his father lives came down and said that Billy wanted to see Holly.

Mr. Hodges: I see.

Mr. Harbert: Just a minute. One of them came where, Mrs. Woody?

I wish you would speak a little louder and not quite so fast—quite confusing——.

A. Said——

[fol. 77] Q. They came down there and said Billy wanted to see Holly on the 27th. While Billy was at Savannah, did he borrow any money from you?

A. Yes. He borrowed fifteen dollars from me.

Q. Said he was broke, and wanted to borrow some money?

A. I didn't know whether he said he was broke, but he said he wanted to borrow $15.00 some time.

Q. Do you remember what day that was?

A. That was on that Saturday afternoon.

Q. I see. That is the 27th?

A. Yes, sir.

Q. February twenty second? Of this year?

Then Billy left with this man, and you don't know where?

A. No, sir, I don't.

Q. In this green colored pickup truck from Texas?

A. That is right.

Q. You don't know of your own knowledge where they went?

A. That is correct.

Q. Then, early in March of this same year, he returned, is that right?

A. Yes, sir.

[fol. 78] Q. And how did he get back?

A. Well, he was driving a car when I seen him in March the first time.

Q. What kind of car was he riding in then?

A. A Buick, black and yellow.

Q. Black and yellow. What you call a Riviera hard top thing?

A. Yes, sir.

Q. Do you remember what day that was?

A. Not exactly, I don't. It was sometime in March.

Q. Did you say it was the first Saturday in March?

Mr. Harbert: No, sir, she did not say that.

A. Well, yes, sir, I will say it was about the first Saturday in March.

Mr. Harbert: How is that?

A. About the first Saturday in March.

Q. You were interviewed by a Special Agent of the Federal Bureau of Investigation, Mr. Hymers, here, earlier, is that correct?

A. Yes, sir.

Q. Is that the date that you told him at that time?

A. Yes, sir.

[fol. 79] Mr. Harbert: What day in March?

I never did understand.

Mr. Hodges: She never did say a date.

Mr. Harbert: She said, "I think the first Saturday in March."

Mr. Harbert: I did not so understand her to say that.

A. I told him I think—I told him I was not for sure, but I believed it was the first Saturday.

Q. Go ahead. Time has elapsed since. You told me in here this morning?

A. Yes.

Q. And I talked to you and saw you for the first time a few minutes ago, is that correct?

A. Yes.

Q. And questioned you about what you are testifying to?

A. Yes.

Q. I hand you a calendar and ask you to look at it and tell us what day—what day the first Saturday in March of this year comes on, please Ma'am.

A. The first——

[fol. 80] Mr. Harbert: I Your Honor please, we can stipulate——

A. It is the sixth.

Mr. Harbert: (continuing) —It is on the sixth, I will admit, and expedite the matter.

A. On the sixth.

Q. Around that date, the first time you remember?

A. Yes.

Q. It could be a day early, a day late, you did not mark it on the calendar any way?

A. No, sir, I did not.

Q. But that is your best memory?

A. That is my best memory.

Q. All right. Whether or not you made a point to attempt to see what kind of license plate was on this car when he drove up in it?

A. I looked, but it was muddy. It wasn't rainy that day, but it was muddy, and I couldn't see it very well. I couldn't see it very well to see what was on there.

Q. You were a little surprised to see him come driving up in this car, weren't you?

A. Well, yes, sir, I was.

[fol. 81] Q. The first time you saw him in this Buick, who was there with him?

A. Hershel Davison.

Q. Is that sort of a buddy, is that right, of his, a young man he pals around with?

A. Second cousin.

Q. Second cousin. And tell us whether or not a few days after the first real time you saw them drive this car up in the front yard of the residence in Savannah at 1110 Cum-

berland Street, and saw them doing mechanical work on it?

A. Yes.

Q. Saw them working on the car, fitting, hammering,—but you are not a mechanic?

A. No, sir.

Q. Don't know what they were doing?

A. No, sir.

Q. You just know they spent several hours working on this car, is that right?

A. Yes, sir.

Mr. Harbert: Now, who is that?

Mr. Hodges: Your client and a man named Davison.

[fol. 82] Your client, who is on trial here.

Mr. Harbert: All right.

Q. It appeared to you that they had been fooling around under the back fender and the corner there, but you don't know?

A. No, sir, I don't know.

Q. You did not pay a great deal of attention to that. How did this car look? This yellow and black combination? Did it look sharp, or how did it look?

A. I liked it.

Q. It looked pretty sharp. Tell us, the jury here, whether or not you were surprised when they painted the automobile black?

Mr. Harbert: Now, if the Court please,——

The Court: Objection sustained.

Mr. Harbert: We object to that.

Q. All right. Tell us whether or not you admired this car repainted?

A. Well, if it had been mine, I would not have painted it, if it had been mine.

Q. You would not have painted it if it had been yours?

A. Because I like yellow and black.

[fol. 83] Mr. Harbert: If Your Honor please, we except to that, what she would have done, what she would like. Somebody else might not like yellow and black.

The Court: All right, strike that.

All right, strike that. It was not responsive.

Q. All right. I believe the first time you saw Billy Woody in this car, tell us whether or not you asked him where he got it?

A. I asked him where he got it.

Q. What did he say?

A. He said his wife bought it for him.

Q. He said his wife bought it for him. And this was the time Davison was with him?

A. Yes.

Q. He was in the car with him——

A. Yes.

Q. (continuing) —With Billy Woody over here when you asked him that?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

[fols. 84-95] Q. And the next time you saw the car after that, what license plates did it have on at that time?

A. Alabama.

Q. Do you know what day this car was repainted from yellow to black?

A. It was painted on the third day of April.

Q. Now, how do you happen to remember that date, Mrs. Woody?

A. Well, on the first day of April, my husband came in from Washington, and we were married on the second day, and the car was painted on the third day, on Saturday.

[fol. 96] HAROLD FATE HUBBARD, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. Will you tell the Court and jury your name, please?

A. Harold Fate Hubbard.

Q. Harold Fate Hubbard?

A. Yes, sir.

Q. Where do you live now, Mr. Hubbard?

A. Well, I have been working at Detroit, Michigan. Not Detroit, but Flint, Michigan.

Q. You were subpoenaed from there to come down here?
A. Yes, sir.

Q. Back in the early part of this year, where did you live then?

A. Back in the early part of this year I lived at Savannah, Tennessee.

Q. Do you know the defendant over here, Billy Gene Woody, Senior, sitting right over there?
A. Yes, sir.

[fol. 97] Q. Do you know a man named Hershel Davison?
A. Yes, sir.

Q. Did you have occasion, while still living in Savannah in the early part of this year, to see Billy Gene Woody driving around in a car?
A. Yes, sir.
Q. Do you remember when that was?
A. Well, it was in March.
Q. What day in March?
A. Well, the first time I saw him, it was around the first of March, about the fourth of March, whenever I first saw him.
Q. How is it you happen to set the day March fourth?
A. Well, I was helping Mr. Wilkinson dig a well.

Mr. Hodges: Yes, sir.

A. (Continuing)—for Mr. Gooch over at Selma.

Mr. Hodges: Yes, sir.

A. We got off work the end of the day, and I was going to town, over in town at Savannah. We were going down to pick out a rod. I heard a car pull up in front. I walked out in front to see who it was, to catch a ride to town, and I seen Billy in a car.

[fol. 98] Q. What kind of car?
A. Buick.
Q. What color?
A. Green color, and black top.
Q. Was it yellow or green?
A. Well, yellow or green, I don't know.
Q. Was it a convertible, or hard top convertible?
A. Yes, hard top convertible.

Q. Riviera style?

A. Well, did not have any piece up there, I don't know.

Mr. Hodges: Yes.

A. I don't know what you call it.

Mr. Hodges: Yes.

A. (continuing)—Hard top convertible, what I call it.

Q. Go on, tell us how you remember it was March fourth?

A. Well, I was there at the store, walking around to town, and this car pulled up, and I walked out to see who it was, you know, because I might go to town. And I seen Billy in the car. And I walked out to the car where he was, and asked him was he going to town, and he said he was. So I walked around the car to get in the car. And whenever I did, this Davidson boy came out of the house. He had a shirt, a pair of pants, and a shirt on a coathanger in the back of the car, and I don't know which, and he got out of the [fol. 99] car, and I got in the car to go to town.

Mr. Harbert: Then——

Q. The Davidson boy came out of the house with a pair of pants and a shirt on a coathanger to go in the car?

A. I don't know whether a shirt and pants together. The coat was on the coathanger, don't know whether the pants.

Mr. Hodges: I see.

A. (continuing)—But it just seemed he had a pair of pants too.

Q. And hang it up in the car?

A. Yes.

Q. How does this tie in with your digging a well?

A. It does to me, we started the well on the fourth for Mr. Gooch, and we finished the well on the fifth.

Mr. Hodges: Yes.

A. (continuing)—And I was telling this guy about Billy coming with this Buick car, telling him about it.

Q. The main reason you remember you finished the well on the fifth, Mr. —— because the man has got the cancelled check with which you were paid, is that right?

Mr. Hodges: If Your Honor please, let the witness state it.

Q. All right. He has the cancelled check which was tendered to you in payment for digging the well?

[fol. 100] A. We were drilling a well.

Q. I mean, drilling a well.

A. I suppose so.

Q. Where it shows cancellation of the check, that it had been to the bank, been cashed, after the check had been cashed, the bank puts holes in it to cancel it, holes for the cancelling of the check?

A. Yes.

Q. But that is one reason——

A. Well——

Q. Dated March 5, 1954?

A. Yes.

Q. Is that what you refresh your memory, you saw him on the day before that?

A. No, sir. I knew that.

Q. Oh, you knew it yourself?

A. Yes, sir.

Q. Now, tell me this much, did you ever own a Buick hard top convertible?

A. No, sir.

Q. Ever own one in your life?

A. Well, I used to work for Jack Davis at the Scrap Yard down there, and he had a '38 Buick, and I was going to swap [fol. 101] a '41 Chrysler for that Buick, and I left my Chrysler, and I drove this Buick for—I don't know, about three weeks, I guess. And so he never did give me any papers there on it, so I let him have it back.

Q. But you have never owned a Buick, any recent model, say, '50, '51, '52, '53?

A. No, sir.

Q. Even in the forties, as far as that goes?

A. No.

Q. Of course, if you never owned one, you never sold Billy Gene Woody, Senior, sitting there, one, did you?

A. No, sir. Never did.

Q. You have known him a long time?

A. Practically all his life.

Q. You live at Savannah? And work, maybe, and he grew up in Savannah most of his life, is that right?

A. That is right.

Q. Did you take a fairly close look at this Buick which Billy Gene Woody drove up in?

A. I looked, and as far as that, never did pay too much attention to it.

[fol. 102] Do you remember whether it had a rear trunk compartment?

A. No, sir, I don't.

Q. What kind of tags, automobile license tags, did this car have on it?

A. It had Alabama license plate.

Q. Do you remember if it had on there the first day you saw it?

A. Yes, sir, it had on there the first day I saw it.

Q. Which would be Alabama, which would be March fourth?

A. March fourth.

Q. You saw it was a pretty nice automobile, so you sort of looked it over that day, is that correct?

A. Well, I just noticed it, noticed him, then knowing him all that time, and I never did know him to drive that good a car before.

Q. Hadn't ever known him to drive that good a car before?

A. No, not that kind of a car.

Q. What kind of a—not casting any disparaging remarks or anything, but are Billy's folks rich or poor or average folks, or what?

[fol. 103] Mr. Harbert: We except to that, if Your Honor please.

A. They are kind of poor people.

Mr. Harbert: If Your Honor please, we except to that. May I address the Court? We except to that.

A. They don't have any money.

Mr. Harbert: (continuing)—about whether the——

Mr. Hodges: If the Court please, Mr. Harbert made in his opening statement the remark this man paid twenty-five hundred dollars in cash for this automobile. And I think that is permissible, certainly as tending to negative that he got twenty-five hundred dollars from his folks.

The Court: I will let the witness answer that, if he can.

Mr. Hodges: Go ahead, sir.

A. That he got the money from his folks——?

Q. Now, I am just asking you, what is their financial circumstances?

[fol. 104] A. Well, they are poor people.

Q. Well,——

A. I don't know how his wife is. He told me that he bought—his wife had bought this car.

Mr. Hodges: Oh.

A. (continuing) Whenever he came over the hill from the Army, he got in the car and came to Savannah.

Q. Oh, he told you he was over the hill from the Army?

A. He sure did.

Q. Is that right?

Mr. Harbert: We except, if Your Honor please, to that. That is incompetent. If you wish to permit it, we'll have to go into a lot of other matters to show why, and the circumstances, and I don't think it is competent as to what he said about being over the hill from the Army.

The Court: If he made that statement to the witness, the witness may testify about it. He told you when he came over the hill from the Army that his wife bought the car for him. Is that what you are saying?

A. That is right.

[fol. 105] Mr. Harbert: That will necessitate having to go in——

The Court: Well, I can't help it. It is competent.

Mr. Harbert: Well, I don't hardly think so.

Q. Did he tell you, Mr. Hubbard, when he went over the hill from the army?

A. No, sir, he did not.

Q. And he stated at that time his wife bought this car for him?

A. Yes, sure did.

Q. And that is the sort of an automobile we would call a slang expression, isn't it?

A. Well, I guess it is.

Q. What does that mean to you? I mean, what was the true meaning of that?

Mr. Harbert: If Your Honor please, I don't think it is in the prerogative of this witness to interpret what he meant by it.

The Court: If he knows. I have never heard the expression before. If this witness knows what it means—— [fols. 106-113] Mr. Harbert: If he knows what this man meant?

The Court: Yes, sir.

Mr. Harbert: But not——

The Court: Yes, sir. Do you know what he meant by that?

A. No, sir, I don't.

The Court: He said he did not know.

Q. A 56 tag is the tag for the county in which Savannah is the county seat, is that correct?

A. That is correct.

Q. Hove you ever owned a 56-D tag?

A. Never owned a 56-D tag in my life.

Q. Never owned one in your life. Now, finally, on this tag—which county is that?

Q. Hardin.

Q. Hardin. Far up in the country?

A. Yes.

Q. Are many of those tags sold in that county?

A. Well, I don't know. There are several Buick cars around there.

Q. You have never seen a very large numbered one, have you?

A. No, sir. I haven't.

[fol. 114] Redirect examination.

By Mr. Hodges:

Q. Did you ever see this car repainted, Mr. Hubbard?

A. Well, the next—before I left to go to Flint, Michigan, —the next morning at 10 o'clock I was standing in front of a store in town up from there, and this Jones boy, which I was going to Flint with, he came down to ask me

if I could go with him. I told him I could, but I can't go tonight. He said, "All right", and I said——

[fol. 115] Mr. Harbert: Well, we except, if Your Honor please, to any conversation there.

The Court: Leave out the conversation.

A. (Continuing) Well, before we left to go, I noticed these two boys standing across the street.

Q. Who were the two boys?

A. Billy Gene Woody and Hershel Davidson, Your Honor, came out, cleaning out a spray gun, Your Honor.

Q. They were——

The Court: Doing what?

A. They were cleaning out the spray, washing up.

Q. What did the boy do?

A. I walked across the street, talked to the boy, had some shop over there between the old station and the store.

Q. In other words, he had this car between two buildings?

A. Yes.

Q. There was a fence came up between Main Street, and had some sacks thrown over it, is that right?

A. Sacks, tarpaulins, didn't pay any attention.

Q. And this Buick car was back between this place where the sacks were thrown over, is that correct?

A. That is right.

Q. Where were these two boys?

A. They were around back with the car.

Q. What were they doing?

[fol. 116] A. They were standing out in front of the gate to clean up, spray the car.

Mr. Hodges: All right.

A. (Continuing) I asked them; while — was talking, I asked if one of the boys were painting the car. They said yes.

Q. What color was it?

A. It was black painted car. It had the grill and headlight off of it.

Q. Tell us whether or not it was the same car you had previously seen that was yellow and black?

A. Well, I couldn't say about that.

Q. Did it appear to be the same car?

A. Appeared to be, yes.

Q. What day was that?

[fol. 117] A. That was February—, rather, the last day of February, I believe. February——.

Q. What day did you go to Flint, Michigan? I thought it was the day before you went to Flint, Michigan.

Mr. Harbert: Now, he said it was the last day of February.

A. The day before I went to Flint, Michigan, the 2nd, left there the next morning.

Q. What month?

A. March,—April, the date I went to Flint.

Q. You haven't had any occasion to remember all of these days, to mark all these dates down, have you?

A. No, sir.

Q. Not clearly. This Court and jury here wants to know—I know you are having to search back in your mind there, when was it you think you went to Flint, Michigan?

A. I went to Flint, Michigan, the 2nd day of April.

Q. And when was it you saw them painting the car? How far before—how much length of time had elapsed before you went to Flint, Michigan, and you saw them painting the car?

A. It may have been the first, first day of——.

Q. First day of what month?

A. You mean before I left to go on to Flint?

[fols. 118-122] Mr. Hodges: That is right.

A. It was the last day of March, or the first day——.

Q. Well, you saw them painting the car the last day of March, and then a day and a half later you went to Flint, Michigan; is that what you are telling us?

A. April 2nd, yes, sir, I went to Flint.

[fol. 123] JIM BROWN HARRISON, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. Are you Mr. Jim Brown Harrison?
A. Yes, sir.
Q. Where do you live, Mr. Harrison?
A. Savannah, Tennessee.
Q. Savannah, Tennessee. Were you living there in March of this year?
A. Yes, sir.
Q. You have never seen me before in your life, have you?
A. No, sir, I don't believe I have.
Q. Now, Mr. Brown,—I mean, Mr. Harrison,—back during March of this year did you see Billy Gene Woody, sitting over there, driving around in a Buick automobile?
A. I saw him at one time.
Q. That is what I mean.
A. Yes, sir.
Q. Did you see him in March of this year driving around in a Buick automobile?
A. Well, I would not say whether it was a Buick or not, [fol. 124] just properly, I wouldn't know.
Q. What kind of car did it look like, the best you remember?
A. I never paid any too much—much attention to it.
Q. Well, just give us your best memory, what your memory tells you about it, please.
A. Well, I just guess, a very rough guess, think it would be a Buick.
Q. Well, it was bigger than a Ford, Chevrolet, or Plymouth type car, was it?
A. Sir?
Q. It was bigger than a Ford, Chevrolet, or Plymouth type car?
A. Yes, sir, I think it was.
Q. It was two-colored?
A. Yes, sir, I think it was two-colored.

Mr. Harbert: Well, now, he hasn't said it was two-colored.

Mr. Hodges: Well, he just go through saying it.

Mr. Harbert: You did it.

Q. What kind of license plate did the car have on it, Mr. Harrison?

A. Well, I believe it had Texas.

[fols. 125-134] Q. You saw it just this one time?

A. Yes, sir.

Q. Do you remember the date at all?

A. No, sir, I don't.

Q. You were just contacted last week and asked that question for the first time, is that correct?

A. Yes, sir.

Q. You didn't know anything about this until last week?

A. No, sir.

Q. You know Billy Gene Woody casually?

A. Yes, sir, know him.

Q. You don't know anything of this?

A. No, sir.

Q. And you were subpoenaed to come up here?

A. Yes.

Q. Did you ever see this car on another occasion?

A. Well, I don't know that I did.

Q. You never paid any particular attention to it, didn't have any particular reason to, is that right?

A. That is right.

Q. But on some date in early March you saw this car and it had Texas license on it?

A. Yes.

Q And that is all you remember?

A. Yes.

[fol. 135] Robert Lee Harris, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. You are Mr. Robert Lee Harris?

A. Yes.

Q. Called Bob?

A. That is right.

Q. Bob, you live on Route 1, Savannah, Tennessee?
A. Right.
Q. What is your business there, sir ?
A. What is what?
Q. What business are you engaged in?
A. Paint and body shop.
Q. Paint and body shop up on Route 1, in Savannah, Tennessee?
A. Yes, sir.

Mr. Hodges: All right.
[fol. 136] Mr. Harbert: A good one, too.

Q. Back during the early part of this year, tell us whether or not you and your wife drove to Bonee's, to his store, Route 1, Savannah, Tennessee, to take some minnows to this Mr. Bonnie?
A. Yes, sir.
Q. May be Bonee,—I don't know how the name is pronounced.

Mr. Harbert: Bonee.

Q. What did you observe after you got there, Mr. Harris?
A. Well, I taken the mussels up to him, and I seen the boys painting the car.
Q. What boys? When you say boys, who is it?
A. Saw the Woody boy.
Q. Is that Billy Gene Woody here? Anyone else?
A. He was the only one painting. Saw some other boys around there, but don't know who they were.
Q. You don't know who they were?
A. Didn't pay no attention.
Q. What kind of car were they painting?
A. Two-tone Buick.
Q. What color was it?
A. Yellow and black.
Q. What color were they painting it?
A. Painting it black.
Q. Painting all of it black?
[fol. 137] A. No, painting the bottom of it.
Q. The top was already black, and they were painting the yellow part black?
A. Yes.
Q. So as to make the entire car black?

A. The entire car black.

Q. Tell me this much. Had Billy Gene here approached you about painting the car?

A. Yes.

Q. What conversation took place there at that time?

A. Well, I told him I would paint it for thirty-five dollars and get it ready. If he sanded it, brought it down there, and brought it down and I didn't have to do anything but spray it, I would spray it for five, if he would furnish the paint.

Q. Do it for five?

A. Yes.

Q. Did you ever do it?

A. Yes.

Q. I thought you went over to Bonee's store and he was painting it?

A. He painted it but he messed it up and I had to fix that.

Q. That is what I say, he did not come pay you thirty-five [fol. 138] dollars the first time?

A. No.

Q. The first time he came and asked you the price for painting it all black?

A. That is right.

Q. And the next thing, you went down to Bonee's store, he was painting himself?

A. That is right.

Q. You say he was messing it up?

A. He messed it up, got it dirty, and it was messed up.

Q. What kind of paint did he use?

A. I think it was Sears-Roebuck.

Q. Was what? Was he putting it on with a brush or spray?

A. Spray.

Q. What kind of spray?

A. It was a small spray. I did not look at it.

Q. Did you see the car when it was originally black and yellow?

A. Yes.

Q. What condition was the paint on it?

A. Well, it looked good to me.

Q. Tell me this much. You had occasion to look at this rather carefully. I believe you at one time asked them if

they wanted to trade this car in on another one, is that right?

[fol. 139] A. Oh, I was kidding his wife about swapping a Plymouth for it.

Q. Did you notice any indented place on this car?

A. It was on the back, the side,—back fender and door.

Q. I believe was that the right rear fender?

A. Yes.

Q. What kind of place was that?

A. Well, it was not too bad a place.

Q. Just been pushed in kind of like?

A. Just pushed in.

Q. What about the rear bumper? Was there any mark there?

A. Yes, right where the bumper curves around there was a dent in that.

Q. It was dented right there?

A. Yes.

Q As a matter of fact, before this trial you and Mr. Long got together and both remembered the same marks, is that correct?

Mr. Harbert: Now, if the Court please,——

A. Yes, we——

Mr. Harbert: We renew our exception to leading the witness and testifying himself. I think——

The Court: Don't lead him.

Q. Did you have occasion to meet Mr. Coy Long, the man here from Texarkana, Texas, sometime this week?

[fol. 140] A. Yes, I met him.

Q. Did you all have occasion to compare the two marks on this car you are telling us about?

A. No, I told you where it was bent, is all.

Q. Did he tell you he remembered those places?

A. Yes.

Mr. Harbert: If Your Honor please, we except to what—all the conversation between these two witnesses as to what——

The Court: That isn't competent. The jury won't consider that.

Mr. Hodges: All right, I will strike that.

Q. When Billy Gene Woody was painting the car, what did he do with this dented-in place?

A. He pulled it up some, and I did some for him.

Q. He pulled it up some and you did some for him?

A. Yes.

Q. As you remember it, this was a Buick car, is that right?

A. Yes.

Q. Was that a hard-top sedan—, convertible, is that right?

A. I think you call it hard-top.

Q. Hard-top convertible?

A. I didn't pay too much attention to it.

[fol. 141] And you did repaint this car some time later after—is that correct?

A. He sanded the paint off it down at my place, brought it down there, used my water hose, and sanded it, he and his wife.

Q. He and his wife?

A. He and his wife.

Q. When was that he and his wife sanded it?

A. I couldn't tell you. I did not keep up with the days. It was on Saturday, I am pretty sure.

Q. How much did he pay you there?

A. Five dollars.

Q. Five dollars for spraying it?

A. Yes.

Q. Why didn't he let you do it originally?

A. Well, he could get it done cheaper doing it his self, I guess, is all I can say.

Q. As a matter of fact, you were just being a good Samaritan, and when you saw what a mess he was making, you said, "bring it down and I will help you", is that right?

A. No, I told him before I would paint it for five dollars. After it rained a little bit, the weather messed it up, all I can say.

Q. I thought you said thirty-five dollars. Maybe I [fol. 142] misunderstood you.

A. Well, thirty-five, that is to paint the whole car. That is me to get it ready, see. But he got it ready.

Q. Oh, I see. Now, when you were kidding him about trading this car and just passing a little conversation, when was that?

A. That is when they were sanding it.

Q. Well, who said who owned the car at that time, if anybody did so?

A. Well, his wife said she owned it.

Q. She claimed she owned it. What did she say about it?

A. Oh, I don't know. I said something about swapping a little Plymouth, I had a little '50 Plymouth I would swap her for, and that is all. She said she wouldn't have it.

Q. You were just kidding, that Buick was a better car than the Plymouth, and you were just teasing her, is that right?

A. Well, that is right, yes.

Q. Did the car look as good or better when you got it painted?

A. Well, it looked good to me, and repainted just like it was. They did a good job of sanding it. I thought they did a good job of sanding it and it looked good.

Q. Did it look as good all black as yellow?

[fol. 143] A. Well, when you do a paint job you make it look as good as we can do.

Q. And do you say it did not look as good? I might be putting words in your mouth?

A. Well, it did not look as good to me.

Mr. Hodges: All right.

A. (Continuing) It might to you.

Q. Was there any conversation between you and defendant Woody here as to why he wanted the yellow portions of the car painted black?

A. No, sir, there was not.

Mr. Hodges: Take the witness.

Cross-examination.

By Mr. Harbert:

Q. I believe you said you went over to Bonee's?

A. Yes.

Q. That is the way you pronounce it isn't it?

A. That is right.

Q. And you saw him out there, he and somebody else standing there, and he was painting the car?

A. That is right.

Q. Where was that shop?

A. That was on the left side of the store.

[fol. 144] Q. That is there in Walkertown?

A. Facing town.

Q. Right on the side of the highway, isn't it?

A. Yes.

Q. What?

A. It was, you know, right beside the store.

Q. Right in front of the stores there?

A. No, it was on the side of them.

Q. Well, there?

A. Yes.

Q. Where everybody could see it?

A. That is right.

Q. Nothing about him trying to conceal or hide it, was there?

A. No, sir.

Q. You saw nothing that would indicate he was carrying on secretly, did you?

A. They had a big blanket hung up to keep dust from fogging up his car.

Q. To keep dust——?

A. To keep dust off it.

Q. Well, that wasn't anything unusual, was it?

A. No.

Q. You did not see anything about where he was doing it, how he was doing it, to indicate he was trying to cover [fol. 145] up the job at all?

A. No.

Q. Speak out.

A. He was just painting it, is all.

Q. I say, you saw nothing to indicate that——

A. No, sir.

Q. (Continuing)—Trying to hide anything. Did he say anything in this conversation there with you that he was trying to secretly do these things and keep it away from anybody?

A. No, never said a word.

Q. Just like anybody else would have done?

A. That is right.

Q. Was there anything about his demeanor or action, or

anything he said, to indicate that he was trying to keep that thing covered up, or that it was stolen, or he wanted to keep it away from other people in any way at all?

A. I never thought anything about it.

Q. Nothing like that at all. Now, you say he came down and asked you about painting it?

A. Yes.

Q. That wasn't anything unusual about somebody coming to you to get you to paint a car, was there?

A. If some man come, I am going to give him an estimate.

Q. What is that?

[fol. 146] A. If a man come, wants a car painted, I am going to tell him what it costs for it.

Q. And you do that business down there?

A. Yes.

Q. And do quite a bit of that business down there?

A. Yes, sir.

Q. And I might say a good one, sir, too, sir.

You never thought there was anything strange about him coming there, bringing a car there for you to paint, did you?

A. No, sir, I did not.

Q. When he talked to you about it, was there anything in his demeanor——?

A. No, sir.

Q. (Continuing)—His manner of talking, saying anything——

A. No, sir.

Q. (Continuing)—To indicate he was trying to conceal the car, anything of that kind?

A. No.

Q. He just wanted it painted?

A. Wanted it painted.

Q. Was there anything unusual about it——, what any other man would have come there and done?

A. No.

[fols. 147-148] Q. Talking about—you were talking to her about trading the Buick; I believe you, Mr. Harris, said something like you were kidding in talking to her?

A. Yes, I was just kidding her about swapping an old Plymouth.

Q. Not serious about it?

A. No, not serious about it.

Q. Not serious about it, just in a jocular way talking to her about trading her?

A. Yes.

Q. Was Billy Gene present at that time?

A. Yes, he was present.

Q. So you and she were talking together?

A. Yes, I was kidding her, telling her I would trade her one that was already painted.

Q. Well, she wouldn't have to paint,—that is just in a jocular way?

A. Yes, that is right.

Mr. Harbert: That is all.

[fol. 149] Mrs. Robert Lee Harris, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. You are Mrs. Robert Lee Harris?

A. Yes.

Q. Where do you live, Mrs. Harris?

A. Savannah.

Q. Does your husband operate a garage there and paint shop?

A. Yes.

Q. He just testified in here, didn't he? Just went out there as you came in?

A. Yes, sir.

Q. Do you remember back in the early part of this year, Mrs. Harris, when you and your husband drove to Bonee's grocery store? I don't know if I am pronouncing that correctly.

Mr. Harbert: If you will say Bone-e, Your Honor, I think it will——

Q. B-o-n-e-e?

A. Yes, Bonee. I don't——

Q. Bonee. All right. Your husband got out and went in [fol. 150] the store, Bonee's store there?

A. Yes, sir, he taken some mussels to them there.

Q. Between the Bonee store there and the next building there is the garage?

A. Yes.

Q. What is between that garage?

A. Well, there is not anything between it except a car was between there when I saw the car out there.

Q. There was an automobile between there?

A. Yes, sir.

Q. What kind of car was there?

A. It was a Buick.

Q. What color was it?

A. It was black.

Q. Was it all black when you saw it?

A. All black.

Q. Was a blanket or something thrown over the fence there?

A. There was a blanket or tarpaulin; I wouldn't be sure just what was hanging over it.

Q. And I believe Billy Gene Woody here was standing outside and had just finished painting his car, is that correct?

A. He was not outside. He was back with the car.

Q. Oh, he was back with the car?

A. That is right. My husband just raised the tarpaulin [fol. 151] up, and I saw him and the car. That is all I saw there.

Q. Yes, ma'am. Later on, was this car brought to your husband's garage to be repainted?

A. Yes.

Q. Do you remember when that was?

A. It was on Saturday before the car was picked up the next week.

Q. You mean when he was arrested and the car was picked up?

A. That is right.

Q. Do you remember when that was?

A. No, I don't remember the date. You can look at the calendar and tell what date it was, but——.

Q. But it was on Saturday before he was arrested that the car was picked up?

A. That is right.

Q. And on that day I believe Billy and his wife were sanding this car in your husband's garage, is that right?

A. No, they were on the outside sanding the car down when I went home.

Q. After they had sanded off this black paint on the car, could you tell what color it was originally?

A. It was yellow bottom, hard-top.

Q. This was a Buick hard-top convertible?

A. Yes, sir.

[fol. 152] Q. Had Alabama license plate?

A. There wasn't any license plate on it when I saw it, because it had all the chrome off there getting it repainted.

Q. Had your husband offered to paint the car for him?

A. That is what he told me.

Mr. Harbert: We except.

Mr. Hodges: I will strike that.

Q. How much did he pay your husband for painting it for him? Or did he paint it?

A. My husband said five dollars.

Mr. Harbert: Not what her husband said. He has already testified.

The Court: Yes, sir; she can't testify to conversations about it.

Q. Well, tell us whether you remember Mrs. Woody saying anything about owning the car.

Mr. Harbert: If Your Honor please, we except.

A. She just mentioned there she did not want——

Mr. Harbert: Just a minute. We except to any conversation there between this woman and Mrs. Woody. It is incompetent and immaterial.

Q. Well, was Billy Gene Woody present when she told you that?

A. Yes, sir.

[fol. 153] Q. All right, what did she say?

A. She just mentioned there she did not want Bob to mess her car up.

Q. Didn't want Bob to mess her car up?

A. This is right.

Q. Tell us whether or not it seemed strange to you he couldn't pay thirty-five dollars to paint the car.

Mr. Harbert: Just a minute.

The Court: Objection sustained. Her conclusions about that would not be proper.

Mr. Hodges: That is all. Take the witness, Mr. Harbert.

Cross-examination.

By Mr. Harbert:

Q. Where you saw him, up at a store there right on the side of the highway, isn't it?

A. That is right.

Q. And the highway, and it is a very extensively travelled highway, isn't it?

A. That is right.

Q. Known as the Pickwick highway, isn't it?

A. Yes.

Q. Black-top, hard surfaced road between Savannah and [fol. 154] Pickwick?

A. That is right.

Q. And a great deal of traffic on it?

A. That is right.

Q. And just a few feet of that store is the highway?

A. That is right.

Q. And right by the side of the store?

A. That is right.

Q. And another store on the street?

A. There is an old grist mill on one side, hardware store on the other there.

Q. But three or four stores there?

A. Yes.

Q. Was anything there to show they were trying to hide the car, anything of that?

A. There was not anything I saw there except the tarpaulin or blanket hanging on the fence.

Q. That was to keep from dropping some fresh paint, was it?

A. What is that?

Q. That was to keep from dropping some fresh paint, was it?

A. You would have to ask them what they hung that for, and I don't know.

[fol. 155] Q. What did you say?

A. You would have to ask them what they hung that for, and I don't know.

Q. I see. But you never saw anything there to indicate any secrecy or trying to hide the car, did you?

A. No, I don't say as I seen them trying to hide it.

Q. You never heard them say anything to indicate they were secretly trying to hide this car at all?

A. No, I did not.

Q. And you did not see anything out there in their demeanor, or action, or anything they said, to indicate they were secretly trying to do anything there, did you?

A. No, sir, I did not.

Q. It was just out in the open like anybody else would have done?

A. Well, if it had been mine, I would have gone in a garage where it would have been cleaner paint than there.

Q. That is what you would do, where you would have clean paint?

A. That is right.

Q. And he did bring it to the garage, didn't he?

A. That is right.

Q. When he brought it to the garage, was anything about it secret?

A. No.

[fols. 156-157] Q. —Trying to cover it up, or anything, because he sent it down?

A. Out in the open.

Q. And the garage, it is sitting out on the street?

A. That is right.

Q. And a great deal of traffic, hundreds of cars passing there all day?

A. That is right.

Q. Right by the place of business?

A. Yes, sir.

Q. And it was one of the most public places, though, isn't it?

A. Yes.

Q. And he brought it right there where other folks were doing work, before everybody that was passing there?
A. Yes, sir.

Mr. Harbert: That is all, I believe.
The Court: All right, you may be excused, Mrs. Harris.
Mr. Hodges: Thank you, Mrs. Harris.

(Witness Excused.)

[fols. 158-159] Howard Greenway, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. Tell the jury your name, please, sir.
A. Howard Greenway.
Q. Howard Greenway?
A. That is right.
Q. Mr. Greenway, are you chief of police at Savannah, Tennessee?
A. I am.
Q. Did you have occasion on or about April 8th to arrest the defendant, Billy Gene Woodly, sitting over here?
A. Yes, sir.
Q. It was on another matter not involved here today, is that correct?
A. That is right.
Q. At that time, did you have a search warrant for his car?
A. I got one for it, yes, sir.
Q. You got one.

Mr. Hodges: You have already seen this one. You might want to see the bill of sale there.
[fol.160] Q. We have here—I will hand you what purports to be bill of sale dated March 15, 1954, appearing to have been before Harold Hobart, Sheffield, Alabama,—has a seal, probably the county, appears to be signed Billy G. Woody. And I will further hand you Alabama original receipt for 1954, which is the Exhibit 3 of Wesley Williams, and ask you to examine both documents and see if you found them

in the car which was seized when you arrested Billy Gene Woody.

A. Yes, sir.

Q. You found both of those documents in the black Buick automobile?

A. In the glove compartment.

Q. In the glove compartment of the black Buick automobile which Billy Gene Woody was riding in just prior to his arrest?

A. Well, now, his wife was in the car at the time. I did not get Billy Gene out of the car myself. This was the car that Billy Gene's wife was in.

Q. Had Billy Gene come down to the police station?

[fol. 161] A. Yes, sir.

Q. Driven down in this car?

A. The other officers had contacted Billy Gene before I came on duty, and when I came on duty they had him at the station, see, at that time.

Mr. Hodges: Yes, sir.

A. (Continuing) So we got a search warrant for this car.

Mr. Hodges: I see.

A. (Continuing) —And went and searched it, and this is what I procured out of the glove compartment of the car,—and his wife at that time, which was in the car.

Mr. Hodges: I will ask for the purported bill of sale there to be made Exhibit 1 to your testimony, and have it so marked. And I want to introduce in evidence the signed bill of sale there.

That is already in evidence, I believe, sir.

(Said document was accordingly marked as Exhibit 1 to the testimony of Mr. Greenway, and same was filed among the exhibits in the cause.)

The Court: Let me see it again a minute there. Just a minute. There is one thing I had overlooked.

[fol. 162] (Document examined by the Court.)

The Court: All right.

Mr. Hodges: I would like to read at this time Exhibit 1 to Chief Greenway's testimony.

"Bill of sale to motor vehicle." (Reading)

"Know all men by these presents:

That in consideration of—" has it written out as: "One dollar and other considerations"—$1.00 again—"the receipt of which is hereby acknowledged, I do hereby grant, sell, transfer and deliver unto Billy G. Woody, his heirs, executors, administrators and assigns, the following described motor vehicle:

"One Buick two door 1952 model car"—truck and tractor were inked out—"with motor number 68791050." "Alabama"—there in "State of"—"To have and to hold all and singular said motor vehicle forever, and said grantor hereby covenants with the said grantee that he is the lawful owner of said motor vehicle, that it is free from all encumbrances except"—and they have "None" written there.

This is a printed form, Your Honor.

[fol. 163] "That he has a good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

"In Testimony whereof, said grant—" grantees, —it should be "e", and put the "s" on it in there,—"has hereunto put his hand"—and on the day—"the 16th day of March, 1954."

Signed, Harold Hobard, Sheffield, Alabama. And, in fact, got Harold Hobart——

The Court: Hobart or Hubbard?

Mr. Hodges: It has Hobart. The Tax Assessor's return shows Harold Hubbard. The bill of sale here shows Harold Hobart.

This is the notary public's seal, then, notarizing it here. Reading from the back there, "Subscribed and sworn to before me, this 16th day of March, 1954. Gladys J. Henderson. My commission expires January 17, 1955."

Mr. Harbert: What State and County is that, General? Does it show that?

Mr. Hodges: Let me see. Well, I can find out in just a minute.

It is Colbert, —C-o-l-b-e-r-t, County.

[fol. 164] Mr. Harbert: Colbert?

Mr. Hodges: Colbert. We have her here, Your Honor. She can testify.

Does the jury care to see this? Does anybody care to see this?

Q. Now, Chief, you had this car wherein were found the motor number there in Savannah, is that correct?

A. Let me have that.

Q. You had this automobile, a '52 Buick, wherein were found this motor number, there in Savannah, is that correct?

A. That is right.

Q. And for other reasons which we won't go into, you called the FBI the next day?

A. I had a call from Houston, Texas, on this.

Q. Well, I mean——

A. (Continuing) And he told me the car he thought was —to be a stolen automobile.

Mr. Maddox: Now, don't——

Q. Don't tell why, Chief. But you had a telephone call, and, for reasons, you turned this automobile, all papers which had been seized and which you have introduced as exhibits, over to the Federal Bureau of Investigation?

A. That is right.

[fols. 165-177] Q. —As a result of that telephone call, is that correct?

A. That is right.

Q. As a matter of fact, I believe you stated the next day you sort of assisted the Federal Bureau—the Special Agents of the Federal Bureau in investigating the car, is that correct?

A. I did.

[fol. 178] Mrs. Gladys J. Henderson, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. You are Gladys J. Henderson?

A. Yes, sir.

Q. Where do you live, Mrs. Henderson?

A. Alabama, Tuscumbia, Alabama.

Q. Huntington and Tuscumbia, Alabama,——

A. Yes, sir.

Q. (Continuing) Those two towns are just about a mile or two apart there?

A. Tuscumbia and what? I did not understand.

Q. Where did you say you were from?

A. Tuscumbia, Alabama.

Q. Tuscumbia, Alabama. All right. I was mistaken. And you were living there during March of this year, did you not?

A. Yes, sir.

Q. During that time were you a notary public?

A. Yes, sir.

Q. Tell us whether or not you had occasion to—on March 16, 1954, notarize what was purported to be a bill of sale [fol. 179] by one Harold Hobart as seller and purportedly selling one Buick '52 automobile to one Billy G. Woody?

A. Yes, sir.

Q. I will hand you this bill of sale which is Exhibit 1 to Greenway, and ask you to see if you can identify it.

A. That is my signature.

Q. That is your signature. Do you know the man over here in the blue shirt behind the podium? Have you ever seen him before?

Mr. Harbert: How was that?

A. When he brought this bill of sale.

Q. You have seen him before?

Mr. Harbert: I can't understand.

Mr. Hodges: Will you stand up, Mr. Woody, please?

The Court: She said she had seen him when he brought this bill of sale.

Mr. Harbert: All right.

Mr. Hodges: Will you stand up, please, Mr. Woody?

(The Defendant stands as requested.)

Q. Is that the man you saw on March 16th?

A. Yes, sir.

Q. Had you ever seen him before in your life?

A. No, sir.

Q. Did he and another man whom you have not been [fol. 180] able to identify come to your office?

A. Yes.

Q. Where is your office? Where is your office?
A. On the corner of Main and Fifth Street.
Q. What business is located there?
A. My husband's insurance business.
Q. Your husband has an insurance business and as an incident thereto you are a notary public?
A. Yes.
Q. You work in the insurance business?
A. Yes, sir.
Q. Two men came and asked if you would notarize a bill of sale, is that correct?
A. Yes, sir.
Q. You had never seen them before in your life?
A. Yes, sir.
Q. You are sure that this is one of the men?
A. Yes, sir.
Q. And the other man, you thought maybe you could identify him, but you weren't positive, is that correct?
A. That is correct.
Q. And did this man sign this name in there where it said "Sold to" up in the bill of sale? Do you remember that?
A. (Pointing on exhibit) No, sir, it was filled out. I only acknowledged the signature.
[fol. 181] Q. It was all filled out except the signature?
A. Yes, sir.
Q. Now, tell me this much. Did this man sign it down at the bottom, the signature, as best you——?
A. No, he did not sign it.
Q. The other man signed it down at the bottom?
A. Yes, sir; yes, sir.
Q. It was on March 16th, the date that is on that?
A. The date on that.
Q. And that is your notary seal on there?
A. Yes, sir.
Q. That is all you know about this transaction?
A. Yes, sir.

Mr. Hodges: Take the witness.

Cross-examination.

By Mr. Harbert:

Q. You have had instances of that kind like that before, have you not?

A. Oh, yes.

Q. It is made out in the usual form, just like anybody else selling an automobile to another man, and the man—the seller, is the one that signed it, isn't he? That is right, [fol. 182] isn't it?

A. The man who——

Q. I can't understand you, Mrs.——

A. (Continuing) The man who sold it, yes, sir. I did not understand you.

Q. The man that is selling it ordinarily signs it?

A. That is right.

Q. And the other man does not sign it?

A. That is right.

Q. The machine won't get the nod. I wish you would speak out, please, so we can get your words, please.

You did not know the other man. This man in here is Mr. Woody.

A. No, sir.

Q. You did not know Mr. Woody, in other words, at that time?

A. No, sir.

Q. You never had seen him before?

A. No, sir.

Q. And had not seen him since until today, have you?

A. No, sir.

Q. What?

A. No.

Q. Never had seen this man since until today?

A. No, sir.

[fol. 183] Q. Don't you think you could be mistaken about his being the man with the other man?

A. I don't think so.

Q. Don't think so. Well, you say he was there; there is nothing unusual for the purchaser to come in there with the seller to get it notarized, is there?

A. No, sir.

Q. Nothing to attract your attention about it. There is nothing out of the way or unusual about it, just in a business-like way both of them, was there?

A. That is right.

Q. And they didn't do a thing that excited your curiosity?

A. No.

Mr. Harbert: Please speak out.

A. No, sir.

Mr. Harbert: I hate to ask you that, but I do want to get this record.

Q. And you never thought anything more about it after it was signed up, you just took the notary and signed it as notary, and you never thought any more about it, did you?

A. I did not sign it at first. I refused it at first. I told them I did not know them and I was not in the habit of taking acknowledgments of people I did not know.

Q. Yes, but you did finally sign it?

A. So the Woody boy—I asked him, I said, "Which is [fols. 184-186] Woody?" He said he was. And then the other boy said he was Harold Hobart.

Mr. Harbert: Yes.

A. (Continuing) Knowing that there were Woody's living around in there around in our town, I thought——, then I took the acknowledgment.

Q. Yes. But he said nothing—Mr. Woody did not, to indicate that there was any crooked work, anything of that kind at all?

A. No, sir, no.

Q. Just a business-like way like anybody else?

A. Yes, sir.

Mr. Harbert: That is all.

[fol. 187] FRED S. ROBY, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hodges:

Q. You are Mr. Fred Roby?
A. Yes, sir.

Mr. Harbert: Fred,—is that it, the name?

Q. What is your occupation, Mr. Roby?
A. Special Agent of the Federal Bureau of Investigation.

Q. How long have you been employed in that capacity?
A. Since 1951.

Q. One of your many duties are investigating Dyer Act violations?
A. Yes, sir.

Q. That is, interstate transportation of stolen automobiles?
A. Yes, sir.

Q. And that is what we are investigating this morning, Mr. Roby, involving a matter involving a man, Billy Gene Woody, sitting right over here with the curly hair and blue shirt. This violation, as charged in the indictment, occurred on or about March 16, 1954. Did you participate in that investigation?
A. Yes, sir, I did.

[fols. 188-193] I believe you were called in by Chief of Police Greenway of Savannah, Tennessee, is that correct?
A. Yes, sir, along with Agent Hymers.

Q. And one of the first things you did, was it not, was to examine a '52 Buick automobile?
A. Yes, sir, I did.

Q. In examining this '52 Buick automobile, tell us whether or not you had occasion to check the public, private, and serial numbers on this automobile?

A. Yes, sir, one of the first things I did was to check all three numbers and lifted them with the finger-print powder and put on scotch tape on a notation which I put in the file.

[fol. 194] Q. Mr. Roby, I hand you here some numbers which you lifted by finger-print technique from a '52 Buick automobile, and ask you if those are the numbers you removed.

A. Yes, sir. The first thing I did was to examine the——.

Q. Before you tell us about it, we want to get it marked. We will want those marked exhibits to your testimony.

A. Yes, sir.

Mr. Hodges: Let it be introduced in evidence here as Collective Exhibit 1.

(Said two sheets were accordingly marked as Collective Exhibit 1 to the testimony of Mr. Roby, and same were filed among the exhibits in the cause.)

[fol. 195] A. I took an impression of the public motor number upon the engine block, which was 68791050.

I also took an impression of the serial number on the left frame, left front frame, up there.

I took an impression of the private serial number, but before I took that impression I determined that since this was a Roadmaster Buick, the last digit on the public motor number should have been a "7".

The Buick Company has a Special, Super, and a Roadmaster classification. And if it is the Special classification, they put "4" as the last digit of the motor number. And it merely denotes the type it is, whether it is a Special, or Super, and so on. "5" denotes Super. And in this case a Roadmaster should have had the last digit.

So we suspected something was wrong with this motor number, so long as the last digit, the eighth digit, was not a "7."

So we then looked at the private motor number, and we determined the first seven digits of it, or all that is important for identification, 6879115.

And we determined that location, and I took that impression with the scotch tape.

From the serial number, 4663-3100, I determined from the National Automobile Theft booklet we always carry [fol. 196] with us that that serial number was assembled—that automobile was assembled at the Kansas City plant, and we learned it was sent from Kansas City, see, to the Nashville, Arkansas——.

Q. To a distributor at Nashville?
A. To a distributor at Nashville.
Q. Dealership?
A. Dealership, yes. sir.
[fol. 197] Q. Go ahead, Mr. Roby.
A. Now, by further examination of this automobile, we did determine then that the last several digits of this public motor number had been changed, because the true or private covered number determined that.
Q. Right at this point now, the private or secret motor number which you described, it is not in a public place on the automobile, however, is it?
A. That is right.
Q. Are the private motor number and the public motor number always the same except the last digit?
[fol. 198] A. Yes, sir, they are always the same.
Q. —Which solely indicates the body type, Special, Roadmaster, Super, and what not?
A. That is right.
Q. And, incidentally, a Riviera could be in all three classes?
A. Riviera——

Mr. Harbert: If Your Honor please, I suggest we let the witness testify to these things instead of letting the attorney.

The Court: Well, don't lead him; don't lead him.

Q. All right, go ahead.
A. Riviera classification is in all three styles on the Roadmaster—on all three styles of the Buick, the Roadmaster, the Special, and the Super. They have Riviera classes—, which was this cream bottom, then yellow body and a black top, which is the Riviera style. They have one in each designation.

The way you tell the difference is this last digit on the public motor number, "7" for Roadmaster, "5" on Super, and so on.

Now, in the further search of the automobile we determined that the license number was a certain number. I [fol. 199] believe it was—I helped take it off, it was Alabama '54 tag 20——.

Q. Pardon me. Now, I will hand you a license number and ask—a license plate, '54 Alabama license plate, 20-10338, and ask you where you obtained that plate from.

A. Obtained this plate from the front of the Buick, front license plate.

Mr. Hodges: I ask that be marked exhibit the next number, and I want it introduced in evidence.

Mr. Harbert: If Your Honor please, our exception goes to this, because of course we are not acquainted and we insist this was procured by an unlawful search and seizure, and we are excepting to that.

The Court: All right, sir. The Court overrules you, sir.

Mr. Harbert: We except.

(Said license plate was accordingly marked as Exhibit 2 to the testimony of Mr. Roby, and same was filed among the exhibits in the cause.)

Q. And you state that this license plate, this '54 Alabama license plate was on the front end of this Buick automobile?

A. Yes, sir.

[fol. 200] Q. I now hand you Exhibit 2 to the testimony of the witness Mrs. Williams, which is her original copy, which is the top copy there. Alabama—the certificate when a license plate is purchased in Alabama, and it bears number 20-10338, and I ask you if you will refer to that and tell us here what it is, and tell us whether that ticket represents that license plate you have in your hand.

A. This ticket has the same number, 20-10338, for the State of Alabama '54 tag. That certifies that Billy G. Woody of Sheffield is the owner of the automobile to which that——.

Mr. Hodges: I would like to pass that to the jury, both of those two exhibits.

(Said exhibits were accordingly passed to the jury for examination.)

Mr. Harbert: If it pleases Your Honor, while it is being passed to the jury, we desire to interpose our exceptions to this, and particularly what this witness said that Billy G. Woody had signed that certificate, and we except on the ground——

The Court: Well, the witness is merely stating that the name Woody——

[fol. 201] Mr. Hodges: Appears.

The Court: (Continuing)—In effect, that the name of Woody appears on there. He is not proposing to say——

Mr. Harbert: Well, we except, furthermore, to that certificate because of the variance. This indictment says Billy Gene Woody, Senior. And that is a variance from the man that is in the indictment.

The Court: Well, that is overruled.

Mr. Harbert: We made our similar exception there before.

Mr. Hodges: And overruled before.

Mr. Harbert: And we are making it again at this time, if Your Honor please.

Q. I will now hand you, Mr. Roby, Exhibit 3 of Mrs. Wesley Williams and ask you to examine the motor number of the '52 Buick there and compare the motor number listed there with the public motor number as lifted off of this '52 Buick automobile you examined.

A. The number on the green slip is number 68791050, which is identical with the number which I lifted from the motor block of this '52 Buick, which we determined was changed and was a false motor number.

[fol. 202] Q. Tell us whether or not the Buick Motor Company ever issued any such number as that.

Mr. Harbert: If Your Honor please,——

Mr. Hodges: We——

Mr. Harbert: If Your Honor please, we object to that unless he knows——.

The Court: Just a moment.

Q. Well, do you know, Mr. Roby?

The Court: Just a moment. Just a moment. I assume this witness is testifying to matters concerning which he has personal knowledge. If he knows, he may testify to that.

Mr. Harbert: Yes, sir.

The Court: But make sure that he knows, Mr. District Attorney.

Q. Mr. Roby, you have examined the series of numbers that were issued for the year '52, and for that number there listed—, is that number there listed there one of the motor numbers for the Buick motor numbers issued during the year '52?

A. Yes, sir, we examined the motor numbers and we learned that this motor number had never been issued by the Buick Motor Company.

Mr. Harbert: If Your Honor please, we object to what he learned.

[fol. 203] The Court: Sustain that objection.

Q. The book in your possession, does it list all the numbers issued by the Buick Company or series of that year?

A. The book I have in my possession lists the beginning number and the last number issued in that scope.

Q. Is that number you found anywhere along between the beginning and the last number of the numbers issued by Buick or General Motors Company for the calendar year '52?

A. I would have to check the book for just a minute.

Q. Will you check and see?

A. I believe it does not.

Mr. Harbert: If Your Honor please, we object to that.

The Court: Objection sustained.

Mr. Harbert: Same reasons.

Mr. Hodges: All right. I would like to have passed to the jury the Exhibit 3 of Williams there, and your collective exhibit showing the public motor number you lifted off the motor block of this car.

(Said exhibits were accordingly passed to the jury for examination.)

[fol. 204] Q. Those exhibits are so marked so the jury can tell which is the public motor number there?

A. I believe I marked it the public motor number.

Q. All right. I want to now hand you, Mr. Roby, the collective exhibit of Mr. Long and ask you to compare the serial number there with the serial number you lifted and the private motor number, which of course is true, with the motor number listed in there.

A. This is car invoice indicating this Buick was sold to Coy Long. Under the heading it has the serial number in-

terchanged with the motor number. Whoever put this down put motor number under the serial number block or the serial number under the motor number block. But the number here which is under the serial number block coincides with the true motor number which I lifted from the secret position on this Buick, with the exception that the motor number on the Buick left off the "7", which merely designates that it was a Roadmaster, and the paper, of course, carried the "7" as the last digit.

Q. I believe you say the secret motor number and public motor number is always the same except for the last digit, and there is usually a dash between the last digit, and that indicates the body style, whether Roadmaster, Super, or Special; is that what you say?

A. Yes.

[fol. 205] Q. And the first seven numbers indicate the true motor number; is that what you say?

A. Yes, sir, that is correct.

Mr. Harbert: If Your Honor please, I hate to interrupt so much, but this has been gone into, and I don't think this witness has any right to review these exhibits. They have been exhibited, and for him to tell the jury—that is a matter for the Court and jury—for him to show where they correspond or where they don't correspond,—all these exhibits have been presented to the jury and they have examined them, and it is not the province of this witness to tell where one is wrong and where one is not, and how they correspond.

The Court: I don't see——

Mr. Harbert: (Continuing) —They speak for themselves.

The Court: I don't see anything objectionable in what the witness is doing, and I can't see that it is prejudicial in any way to the defendant's rights in this matter. The witness is merely, as I say, in the proper way attempting to clear up a little confusion in respect to these numbers. I think it is [fols. 206-209] highly proper that he do so. The objection is overruled.

Mr. Harbert: Pardon me just one minute. My objection is that principle of res ipsa loquitur, the instruments speak for themselves.

The Court: That is true, the instruments do speak for themselves, but the Court overrules the objection then. All right.

Q. And you say there—may I have the Exhibit 1 of Long, Mr. Berg, please.

Thank you.

And you say here that on the Dillard Buick Company, Nashville, Arkansas,—I am reading from the Collective Exhibit 1 to Long, it has got a place printed up here, serial number, motor number, they interchanged these numbers, that the serial number belongs where it says motor number, and the motor number belongs where it says serial number, is that right?

A. Yes, sir.

[fol. 210] Q. Again I am handing you the Collective Exhibit 1 to Long, which has the motor and serial numbers on it reversed, and I will ask you to pass with that the private or secret motor number and the serial number which you lifted from the automobile to the jury. And I believe you said that private motor number on this car did not have the last digit, which was solely for the purpose of identifying one of the three body styles which the Buick people produced.

A. The true or private motor number is by itself on the one sheet, while the serial number is the bottom one on this one with two on it.

Q. Before you do check that there, you read it off and say it again for us; read it to the jury, please, for us.

A. It indicates on the car invoice as serial number for the car, which reads 68791157. The true or secret motor number in this case reads 6879115, leaving off the "7" digit, which indicates that it was the Roadmaster classification.

Now, under the motor number block appears the real serial number, which is 46633100. And that appears on the second here, which I took off the left frame of this automobile, 46633100.

[fol. 211] Q. The other number which you lifted off of there was the motor number, the public motor number which you lifted off of this Buick automobile, indicating it had been changed by a die or some other means, is that correct?

A. Yes, sir.

Mr. Hodges: All right. Pass that to the jury, please.

(Said exhibit was accordingly passed to the jury for examination.)

Q. What color was this automobile when you examined it, Mr. Roby?

A. Black.

Q. Tell us whether or not you had occasion to examine the trunk of this automobile?

A. After we determined that the motor numbers were changed on the car and the car was stolen, we, as is our custom, we examined the automobile so that we can report the condition of it to the true owner.

Q. What was the condition of the trunk lock?

A. In the trunk compartment when we opened it we found, first, that it had been drilled out, the lock on the trunk had been drilled. And as we opened the trunk, I proceeded to find behind a false fiber partition this can, this gas can.

Q. Excuse me there for an interruption.

[fol. 212] A. All right.

Q. But, at this point, did you have occasion to look at the color of the trunk?

A. Inside the deck lid was yellow, inside the deck lid of the trunk.

Mr. Harbert: If Your Honor please, our objection is continuing there. The policeman said he got a search warrant and searched the glove compartment and got these instruments. Now, this man is going back to the back end, and he had to break into the back end. Our exception is it is unlawful search and seizure will go to that answer, Your Honor.

The Court: This man did not seize the car. I have tried to make clear to you, Mr. Harbert, someone else seized it; the City officer seized it and turned it over to him several days later. He was doing nothing but his duty when he investigated this automobile and inspected it. There is no search and seizure question in this lawsuit in any shape, form or fashion. The objection is overruled.

Q. What color was the lid of the hood let down on the back?

[fol. 213] A. Lift of the hood?

Q. I am trying to ascertain whether or not if you saw what the original color was.

A. The original color was yellow or cream color.

Q. Could you tell that from your examining it, lifting up the hood, and see it had been painted?

A. That is right, yes, sir.

Q. The black paint went where the lid came down on the trunk, is that right?

A. Yes, sir.

Q. You started to tell us about this gadget over here. You say you found that in the car?

A. Yes, sir, I found that in the trunk compartment back up against the back piece.

Mr. Hodges: All right, I would like that to be marked as Collective Exhibit number—next number, I believe it is 3.

(Can and hose were accordingly marked as Collective Exhibit 3 to the testimony of Mr. Roby, and same were filed among the exhibits in the case.)

Q. Now, Mr. Roby, tell us what that collective exhibit that has just been introduced is, if you can tell us what it consists of, please.

[fol. 214] A. May I get up there as I do?

Q. You might bring it out in front there so the jury can see.

First, tell us where you found that in the automobile.

A. This can, which was determined to be a one hundred pound can, holding approximately twelve gallons or a little more, was found lying on—this faced right straight in the trunk compartment. Now, you see, we have welded pipes on this tank. One is a piece of copper or metal tubing which ran all the way to the front of the vehicle. It was connected to the fuel pump. There were hoses—this green hose, in this fashion, ran from one of these two outlets—, two here, ran from this one to the opening into the regular gas tank on the Buick.

Q. This tank here was sitting above the gas tank of the car?

A. Sitting up in the trunk compartment, as far back in the trunk compartment as you could get, with the fiber

partition raised up so you can just see it when you raised the trunk up.

Q. If you raise the trunk compartment, do you see this can?

A. You do not see it.

Q. Exactly where was this can when you found it?

[fol. 215] A. It was behind the fiber partition that had been set up there.

Q. What was on the other side there?

A. What is that?

Q. What was on the other side of the can there?

A. The can was on one side of the fiber part, and the open part of the trunk was on the other side.

Q. Where was it in relation to the back seat of the car?

A. This was immediately behind the back seat of the car.

Mr. Hodges: All right.

A. (Continuing) Lying on the side in this fashion.

Q. Oh, I see. It was behind the back seat, lying right behind the back seat, and against it there was a fiber partition, so that when you raised the trunk one could not see this object?

A. That is correct.

Q. It was in what you would determine a concealed position in the automobile, is that correct?

A. That is correct.

Mr. Hodges: All right, then, go ahead.

A. (Continuing) From this pipe on the tank there was this black hose which disappeared down the side of it as [fol. 216] was attached, and then going inside the rear seat of the car on the right-hand arm rest as I took it off, following this piece of hose, I found this piece of cooled copper hose between this arm rest and the upholstery on the right-hand side of the rear seat and the metal of the automobile.

Q. You mean there was a hollow space between the outside of the car and the upholstery of the rear seat there right behind—or where your arm rest was, you found clean up in that space behind the arm rest this black rubber hose? Is that what you say?

A. Yes, sir.

Mr. Hodges: Go ahead.

A. (Continuing) In the back also, behind the trunk compartment, we found this hose, which is a form of gas cap on a regular automobile, which has a hole drilled into it and welded piece of pipe on top so that it could be put on the gas tank and screwed tight to keep any air——.

This hose can be attached to it, and this automobile could pull up beside another automobile, put this into the automobile on the side, attach the hose, start its engine, and the fuel pump would pump all the gas out of that other automobile into this tank.

Q. And where would gravity flow take the gas from that [fol. 217] tank, then?

A. Then if he needed—he would have this tank, and if he needed, he could use this hose, which had a wooden block on it, and just drain from this tank into his regular gas tank.

Q. This tank was above the regular tank built on this car which you mentioned?

A. That is right.

Q. It could be pumped, after filling that tank, let it drain into the gasoline tank built into the car?

A. Yes, sir.

Q. You say the copper line which you raised up there led out in a little sort of circle?

A. It went down under the back seat along the floor and up into the engine.

Q. Was it in an apparent or concealed position?

A. No, it was in a concealed position and hard to find; had to take this upholstery and find where it was drilled into the floor and over to the body of the car.

Q. Holes were actually drilled in the bottom of the car to enable that tank to be put in a concealed position and reach the fuel pump, which is at the motor of the car?

A. Yes.

Q. When the motor of the automobile is running, the [fol. 218-220] fuel pump will create a vacuum, or create a partial vacuum in this tank here which you have exhibited here, consequently gasoline from another automobile would be sucked into this tank. Is that what you are telling us?

A. Yes, sir.

Q. And, incidentally, that car is a Roadmaster series, Riviera style?

A. Yes, sir.

Q. (Continuing)—That you are talking about?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

[fol. 221] Q. Mr. Roby, tell us whether or not you had occasion to interview defendant Billy G. Woody sitting over there on or about April 9th of this year.

A. Yes, sir, Agent Hymers and I interviewed him.

Q. Prior to questioning him, tell us whether or not you advised him of his rights.

A. Yes, sir, we advised him that he had a right to [fol. 222] have an attorney present, and he didn't have to make any statement to us, and that any statement that he did make could be used in a court of law against him. And he was advised that we could not promise him anything. We identified ourselves as agents by showing our credentials.

Q. Yes, sir. And after making those statements to him, tell us whether or not you asked him some questions, and if so, what those questions were, and what his answers were.

A. Yes, sir, he was asked the question where he got this Buick automobile. He stated that he purchsed this Buick automobile on March 16th at Sheffield, Alabama, and he stated that he paid twenty-five hundred dollars cash for that automobile.

When he was asked where he got that cash, he stated that he obtained that cash gambling at Las Vegas, New Mexico.

Q. New Mexico?

A. Yes, sir. And upon further questioning we asked him what date was that that you were at Las Vegas, New Mexico. And he stated that he did not think that was important or none of our affair particularly what date he was in New Mexico.

Q. He refused to answer the question, is that what you are saying?

[fol. 223] A. Yes, sir.

Q. Tell us whether or not you asked him from whom he bought the car.

A. When he bought the car?

Q. From whom.

A. From whom he bought the car. He stated that he purchased the automobile from the individual—, Mr. Hymers showed him the bill of sale that had been obtained, and he stated that, "I purchased the automobile from the individual whose name appears on that bill of sale."

Q. Did you ask him anything about this, the purported individual whose name appears on that bill of sale?

A. He was unable to—he said he had seen him one or two times, was unable to specifically identify him or point out where he could be reached.

Q. Was he able to tell you any one thing specific about this purported individual?

A. Not anything that I can recall that is very clear.

Q. You took notes on that interview, and if he had, you would have the information down, is that correct?

A. Yes, Mr. Hymers took it down there.

Q. And he did not tell you it was on March 3rd, he [fol. 224] claimed it was on March 16th he bought that car, is that right?

A. Yes, sir.

Mr. Hodges: Take the witness.

Cross-examination.

By Mr. Harbert.

Q. Mr. Roby, you asked him,—Mr. Woody,—in that same conversation, did you not, for evidence of the fact he bought the car?

A. Mr. Hymers had the bill of sale which——

Q. Oh, Mr. Hymers already had it?

A. Yes, sir.

Q. Had Mr. Woody turned it over to Mr. Hymers, or do you know about that?

A. To the best of my knowledge, Mr. Hymers had received it from the Chief of Police, Howard Greenway.

Q. But anyway, you had the bill of sale which had been introduced here, showing from whom he had bought this car, didn't you?

A. It had a name on it, sir.

Q. That is what I saw. You know what I asked you. That bill of sale purported to show from whom he bought it, didn't it?

A. Yes, sir, it contained the false motor number.

[fol. 225] Q. It contained a false motor number?

A. It bore a false motor number, sir.

Q. Well, anyway, it showed other numbers all right, wasn't it? It was the same car, wasn't it?

A. Not—, it was the same car.

Mr. Harbert: Yes.

A. (Continuing) —As far as the public motor number was concerned.

Q. And it was the same car, or you thought it was the same car. The same car mentioned in that bill of sale is the car that is in controversy here, isn't it?

A. Until it was proved otherwise, I would assume that.

Q. Assume it?

A. Yes, sir.

Q. Now, Mr. Roby, don't you know the car you have been speaking of here, positively, don't you know that it meant the same car, identified it? You have taken it all the way through as the same car, didn't you?

A. I did not know it was the same car after I determined what the motor number on the Buick was.

Q. Well, you determined it, didn't you?

A. Well, the motor number was different on the Buick. The secret motor number was different on the Buick than on the bill of sale.

[fol. 226] Q. I ask you this. Does that bill of sale cover this identical car?

A. Not necessarily so.

Q. Not necessarily so. You think it covers another car, then? That is your opinion, is it?

A. No, it is not my opinion.

Q. Well, what is your opinion about it?

A. My opinion is that this bill of sale covered a—this automobile under its false motor number.

Q. All right, it was this automobile, then.

All right. And that bill of sales was regular and in order, wasn't it, except this process on those motor numbers on it?

Mr. Hodges: I want to renew my objection, Your Honor. We have gone over this bill of sale twice.

The Court: Well, he is entitled to cross-examine him about it.

Mr. Hodges: All right, I will withdraw the objection.

Q. This bill of sales was in regular order; you know what the bill of sales is, do you not?

A. To a degree, yes, sir.

Q. Yes, sir. You are working with the FBI, and it is [fol. 227] part of your job is to know these things, and you know what a bill of sales is, and this bill of sales is usual in every respect so the title passed to this defendant on that car, wasn't it?

A. Yes, sir, by my work in the FBI I know anyone can fill out a bill of sale.

Q. Yes, I know. I did not ask you for that, whether you can fill it out. I know you can fill them out.

But this bill of sales on its face is regular in every respect; it was sworn to before a notary public, wasn't it?

A. To the best of my knowledge, yes, sir.

Q. Yes, sir. And what other way could he have shown you the title other than to have shown you that bill of sales, now, Mr. Roby?

A. Oh, a certificate of title would be another way.

Q. Yes. Well, if that is all the title he had, that is all he could offer you, wasn't it? And he showed you everything he had about it?

A. I guess so.

Q. Did he show you another bill of sales that this man Hobart is alleged to have turned over to him showing where Hobart got it?

A. Not to my knowledge; not another bill of sale, no, sir.

[fol. 228] Q. Oh, yes. Nothing was said about that bill of sales there?

A. No, sir, he did not seem to want to answer my questions.

Q. Yes. But you did considerably cross-examine him, you and Mr. Hymers both, in the absence of any lawyer?

A. We advised him he had the right to have an attorney present, sir.

Q. Yes. You did give him a kind of third degree, didn't you, Mr. Roby, in a way?

A. No, sir.

Q. Didn't do it. And he did not try to keep anything from you about where he got the car, did he?

A. I believe he did, sir.

Q. Not what you believe. You did not see anything to indicate he was telling a falsehood?

A. He refused to answer our question when he was at Las Vegas, New Mexico.

Q. Now, you are positive of that, are you?

A. Yes, sir.

Q. Positive as anything you have testified in this lawsuit?

A. Yes, sir.

Q. Now, Mr. Roby, isn't it a fact that Las Vegas is in [fol. 229] Nevada, not New Mexico?

A. He said Las Vegas, New Mexico.

Q. Isn't it a fact that there is not a town named Las Vegas in New Mexico?

A. I am merely saying what he said.

Q. Do you think it is New Mexico, the town of Las Vegas?

A. No, sir, I am of the belief that Las Vegas is in Nevada.

Q. Did you ask him about wasn't he mistaken when he said Las Vegas, New Mexico, and didn't you ask him whether it was Las Vegas, Nevada, or not?

A. Yes, sir.

Q. But he still said it was Las Vegas, New Mexico?

A. He just did not answer; just sat there and did not even answer.

Q. Didn't answer you that?

A. Yes, sir.

Q. All right. Now, back to this extra tank in there, Mr. Roby, that is just an extra tank you carry along in an automobile to carry an extra supply of gasoline, wasn't it?

A. No, sir.

Q. That is what its object was?

A. No, sir.

Q. What is it for?

[fol. 230] A. It is a type of tank which is used to enable an individual to travel long distances without having to stop at a service station.

Q. That is what I say, just to carry an extra supply of gasoline?

A. But it is so piped in with the motor to indicate that he might have used it for some criminal activity so that he would escape notice for five hundred miles.

Q. That is just the purpose of having extra gasoline——, that is a mere conclusion you reached, isn't it?

A. Perhaps it is.

Q. It is your conclusion, the whole interpretation? Just to supply him extra supply of gasoline? That is correct, isn't it?

A. Well, he must have had it to steal gasoline from other automobiles.

Q. He couldn't put bought gasoline in that contraption, you think?

A. It is very hard to put bought gasoline in that, because he has to pump it out of another automobile at the end; he can't get it off of there.

Q. You mean the purpose of that gadget is to permit him to steal gasoline from other automobiles?

A. Yes.

[fol. 231] Q. That is the purpose?

A. Yes, sir.

Q. It is not for the purpose of enabling him to carry an extra supply of gasoline, is it?

A. No, because you can't fill it from a standard pump.

Q. All right. It was put in the back compartment of the car. There was a kind of cardboard or a fabricated matter that is cut out there to fit it, to fence that off to itself, wasn't there?

A. Yes, sir.

Q. And that was to separate any luggage you might have in there from that tank, and that is what that was used for, isn't it?

A. That could be a possible purpose, yes, sir.

Q. Do you know any other purpose?

A. Yes, sir, to keep anybody that lifted up the lid from seeig the tank.

Q. Well, you could look for that cardboard, if you wanted to see it, and have seen it there, couldn't you?

A. It was difficult, the fact that it was not observed immediately upon examination in the trunk compartment by the officers in examining it.

Q. You have seen that sort of tanks around here on those big trucks carrying extra tanks for gasoline, don't [fol. 232] you?

A. Not in that, no.

Q. Well, they carry extra tanks for gasoline, don't they?

A. Not to my knowledge, sir.

Q. You don't know? You have never seen these large trucks, sir, furnished with extra tanks for gasoline?

A. They may have them, sir, but I am not familiar with them.

Q. There is not anything criminal about it, is there, for a man to fix a tank in his car?

A. The only thing criminal is it enables him to steal gas from other automobiles.

Q. Well, it enables him to do it, but if he does not do it, there is nothing criminal about it, is there?

You are very much interested in this prosecution, are you Mr. Roby?

A. I am interested in all cases which I investigate, Mr. Harbert.

Q. You don't know he put that in there?

A. No, sir.

Q. Don't know he put it in there?

A. No, sir.

Mr. Woody?

[fols. 233-257] Q. You know so much about it. You don't know where it came from?

A. No, sir. All I know was it was in there.

Q. You don't know how long it had been in there?

A. No, sir.

Q. And if he bought this car from Hobart, you don't know whether it was in there when he bought it or not, do you?

A. No, sir, I do not.

Q. You don't know that Mr. Woody had anything to do with putting that fabricated board there to shut it off from the other part of the car, do you?

A. No, sir.

Q. And you don't know but that the car as you saw it that day was just in exactly the same shape he got it from Hobart, if he got it from Hobart?

A. That is correct, sir.

[fol. 258] The Court: Any special requests for instructions at this time, gentlement?

Mr. Hodges: None from the Government.

(Discussion between the Court and counsel about special requests, and in re motion on behalf of the Defendant.)

Arguments were thereupon presented to the Court and jury by Mr. Hodges, in behalf of the Government, and by Mr. Maddox in behalf of the Defendant, and by Mr. Harbert also in behalf of the Defendant, after which closing argument in behalf of the Government was made by Mr. Hodges.

Whereupon, the Court charged the jury, as follows:

[fol. 259] CHARGE OF COURT TO JURY

The Court: Members of the jury, as you understand, I am sure, the indictment in this case, which is a means only by which the defendant is brought before the Court for trial, charges the defendant, Billy Gene Woody, in two separate counts with the offenses of transporting in interstate commerce a stolen motor vehicle, knowing the same to have been stolen, and with receiving and concealing said motor vehicle which was at the time moving in interstate commerce, defendant Woody knowing at the time that said motor vehicle had been stolen.

The law makes it the duty of the Court to give in its charge to the jury the applicable law of the case, and the duty of you jurors to carefully weigh and consider all of the evidence adduced, and apply it to the law as given you by the Court in making up your verdict. You jurors are the sole judges of the facts, and also the judges of the law as applies to the facts in the case, but cannot disregard the law [fol. 260] as given you by the Court. The jury in no case should have any sympathy or prejudice, or permit anything but the law and the evidence to influence it in determining its verdict. You should render a verdict with absolute fairness and impartiality as you think truth and justice dictate. Every fact and circumstance in the case you may consider in arriving at your verdict.

I shall now advise you concerning the statute which is applicable to the charge in this indictment.

It is unlawful, under the statute under which the indictment herein is based, for one to transport, or cause to be transported, in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, and it is unlawful for one to receive or conceal any such motor vehicle moving as or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen. As punishment for each of these separate offenses, the law

provides for a fine of not more than five thousand dollars, or by imprisonment of not more than five years, or both, within the discretion of the Court.

[fol. 261] The term "interstate commerce", for your benefit, means transportation from one state, "territory" or the District of Columbia, to another state, territory, or the District of Columbia.

An automobile within the meaning of the statute involved here is stolen when it is feloniously taken or carried away; that is, with the intent to steal the same and deprive the true owner of it.

You might say one of the main essentials or ingredients of the offense of transporting in interstate commerce a stolen automobile and of the offense of unlawfully receiving or concealing such automobile moving as, or which is a part of, or which constitutes interstate commerce, knowing the same to have been stolen, is guilty knowledge that such automobile was stolen. It is not per se, or in and of itself, a crime to transport in interstate commerce a stolen automobile, or to receive or conceal the same while moving in interstate commerce. The crimes charged are transporting same or receiving or concealing same, knowing at the time it to have been a stolen automobile.

[fol. 262] Guilty knowledge of the accused, as same relates to all, or both, counts of the indictment, may be inferred from circumstances, but such circumstances must be such as would lead the accused to believe that the automobile was stolen.

The gist of the offense is the actual state of the defendant's mind when he transported the car in question; that is, if you find he did actually transport same, and when he received or concealed said automobile, if you find from the proof he actually did either of these things, and not what under like circumstances might be the state of mind of some other person. The standard by which guilty knowledge is to be imputed is the defendant's mental attitude, and not that of the imaginary average or prudent man. It is not necessary to show knowledge by direct testimony, nor is it essential that the accused party have actual or positive knowledge such as one acquires by personal observation of a fact. It is not required that the defendant should see the thief taking the automobile or that the thief should have

told him he stole the automobile. As stated above, knowl-
[fol. 263] edge may be inferred from circumstances. Anything amounting to notice, whether such notice be direct or indirect, positive or inferential, will satisfy the statute. But even so, before you would be warranted in bringing in a verdict of guilt against the defendant in this case, you must find beyond a reasonable doubt that there was knowledge on the part of the defendant that the automobile in question was stolen when it was transported or when it was received or concealed; that is, if you find any of these things were actually done. Of course, if you find the defendant himself actually stole the automobile involved herein, then the question concerning guilty knowledge becomes a simple one for the jury.

You are instructed that if there is proof that the defendant in this case had come into possession of the automobile herein shortly after it was stolen, in the absence of an explanation, would justify an inference that such defendant knew the automobile was stolen, but compels no finding to that effect. Such unexplained possession of recently stolen property is no more than a circumstance to be considered by [fol. 264] you in connection with all other facts and circumstances of the case in determining the question of the defendant's guilt or innocence.

The Court instructs you that proof of mere possession or custody of the automobile described in the indictment in this case by the defendant would not in itself be sufficient to establish that he knew the car had been stolen. There must be other evidence, other facts and circumstances tending to show guilty knowledge beyond mere possession or custody by the defendant; that is, if he actually did have possession or custody of the automobile in question.

The Court instructs you that, with respect to the second count of the indictment, being the reception and concealment of the car in question, among other things, that it is incumbent upon the Government to prove beyond a reasonable doubt that the car in question which it is charged the defendant herein received or concealed was, at the time, moving or being transported in interstate commerce; that [fol. 265] is, in a continuity of transit from one state to another state, and that the defendant at the time of such reception or concealment of the car knew the same to have been a stolen car.

While it is necessary that the Government show the interstate movement of the car as stated, it is not necessary to a conviction under the second count that the Government prove the defendant knew the car was being transported in interstate commerce at the time of its alleged reception or concealment.

While possession of recently stolen property may call for an explanation, as stated, it is not necessary that the explanation come from the defendant. It may arise from evidence introduced by the Government itself.

The Court instructs you that if you find the Buick automobile in this case was in the possession of the defendant in or near Savannah, Tennessee, as contended by the Government, such possession would not raise a presumption against the defendant that the automobile had been transported in interstate commerce. The burden is upon the [fol. 266] Government to prove beyond a reasonable doubt the transportation of the automobile in interstate commerce.

The Court instructs you further that mere possession of a car or automobile, nothing else appearing, would not be sufficient to base a conviction of the violation in this indictment here at bar.

Incidentally, it is not necessary that one actually drive the automobile in a case of the type on trial before he can be convicted of the two counts under this indictment. If he under the proof, as aforesaid, knowingly aided and abetted in the transportation, that is, the transportation in interstate commerce or reception or concealment of the car while same was moving as interstate commerce, that is all that is necessary.

The Court instructs you that whoever directly commits any act constituting an offense defined in any law of the United States, or knowingly aids, abets, assists, counsels, commands, induces or procures its commission is a principal and punishable as such.

[fol. 267] Ladies and gentlemen, it is the Government's contention under the first count of the indictment defendant Billy Gene Woody, Sr., did in early March, 1954, unlawfully transport or cause to be transported in interstate commerce from or near Sheffield, Alabama, to Savannah, Tennessee, a Buick automobile which the defendant Woody knew was a stolen automobile.

It is the Government's contention under the second count of the indictment that the defendant Woody did on or about the same date receive or conceal, through the changing of license numbers and painting of the car, among other things, the automobile aforesaid, the property of Coy Long, which was then and there moving in interstate commerce from a point in or near Sheffield, Alabama, to Savannah, Tennessee, and at all time material the defendant Woody knew the same was a stolen automobile.

If you believe and find the Government's contentions with respect to either or both counts of the indictment have been proved beyond a reasonable doubt, it would be your duty to convict the defendant and report a guilty verdict to the Court accordingly.

[fol. 268] The defendant in this case, on the other hand, denies he is guilty of the matters and things charged against him in the indictment and has entered formal plea of not guilty of both counts of same.

Defendant specifically denies he participated in any way in the transportation of a stolen automobile in interstate commerce between the points of Sheffield, Alabama, and Savannah, Tennessee, knowing same to have been stolen. He denies that he received or concealed any such automobile moving in interstate commerce or as a part thereof, knowing the same to have been stolen.

If you find in accordance with the defendant's contentions concerning the charges in this indictment, or have a reasonable doubt concerning same, or entertain a reasonable doubt concerning the Government's contentions, you will acquit the defendant and report to the Court a verdict of not guilty.

You enter upon this investigation with a presumption that the defendant is not guilty of any crime, and this presumption stands as a witness for him until it is rebutted [fol. 269] and overturned by the Government by competent and credible proom. It is, therefore, incumbent upon the Government, before you can convict the defendant, to establish to your satisfaction beyond a reasonable doubt that the crime or crimes charged in the indictment, and every constituent element thereof, have been committed, that same were committed within the Western Judicial District of Tennessee, Eastern Division, that the defendant at the bar committed the crime or crimes in such a manner as would

make him guilty under the law heretofore defined and explained to you.

By reasonable doubt is not meant any possible or captious doubt that may arise in your minds, but it is that doubt engendered after the application of the reasoning or logical processes to the evidence in the case, and an inability after such to let the mind rest easily upon the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict on any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense or offenses charged.

[fol. 270] You will take all of the evidence adduced in the case by the Government and by the defendant and give it a full, fair, and impartial consideration. If there are conflicts in the statements of witnesses, it is your duty to reconcile them if you can, for the law presumes that every witness has sworn to the truth; but if you cannot, the law makes you the sole and exclusive judges of the credibility of witnesses and the weight to be given their testimony.

In forming your opinions as to the credibility of a witness, you may look to proof, if any, of his general character; the manner and demeanor of the witness; the consistency or inconsistency of his statements; their probability or improbability; his ability and willingness to speak the truth; his intelligence and means of knowledge; his motive to speak the truth or swear a falsehood.

There are several methods of impeaching or discrediting a witness. One is to prove that a witness at different times has made conflicting statements as to the material facts of the case as to which he testifies.

[fol. 271] Another is by a rigid and close cross-examination to involve the witness in contraditions and discrepancies as to material facts stated by him. Immaterial discrepancies in the statements of witnesses do not affect their credibility unless there is something to show that they originated in willful falsity.

And you, members of the jury, are to determine how far the testimony of any impeached witness in this case has been impaired by either of these invalidating processes. It is a question to be decided by the jury, like all other questions of fact, and is not to be judged by the number of witnesses for or against, but by their respectability, intelligence, consistency, and means of information.

Members of the jury, since this to some extent is a circumstantial evidence case, it is proper for the Court to give you an instruction on circumstantial evidence as relates to the charges in the indictment that the defendant transported in interstate commerce a stolen vehicle and received [fol. 272] and concealed such vehicle which was moving as interstate commerce, knowing at the time that same had been stolen.

You understand there are two kinds of evidence, direct and circumstantial. Direct evidence is that sort of evidence by which a fact is proved directly and without inference from other facts. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts. In arriving at your verdict you are to consider all of the evidence, both direct and circumstantial.

Before a fact sought to be established by the Government can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances shown in the evidence shall reasonably give rise to an inference of such fact, but also that no other equally reasonable inference can be drawn from the circumstances proved by the evidence, one consistent with the fact to be proved and the other inconsistent therewith, you should not infer the fact sought to be proved from such circumstances alone. Moreover, when the Government's right to prevail depends [fol. 273] upon the existence of a particular fact which must be inferred from proven facts, it is not permissible to make such an inference in the face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.

As you understand, the jury may convict upon circumstantial evidence, and it is its duty to do so in proper cases. In a proper case it is as much its duty to convict upon circumstantial evidence as upon direct and positive proof Before a jury is justified in finding the defendant guilty on circumstantial evidence it must be satisfied from the evidence, beyond a reasonable doubt, of the guilt of the defendant and that the evidence is not only consistent with his guilt but inconsistent with his innnocence, and that the evidence excludes every other reasonable hypothesis or explanation except the hypothesis or explanation of guilt.

[fol. 274] Ladies and gentlemen of the jury, the Government as a part of its proof in this case relies on certain verbal statements allegedly made by the defendant during the investigation of this case to Mr. Hymers and Mr. Roby of the Federal Bureau of Investigation, which, with other circumstances, it contends may permit of an inference pointing to the defendant's guilt in this case. It is for you jurors to say whether or not such statements were made, and if found true, it is for you to say what weight you will attach to them in your consideration of the whole body of the proof.

The Court instructs you that before you can consider any such statements the defendant is alleged to have made to the officers aforesaid, the Government must show beyond a reasonable doubt that such statements were freely and voluntarily made and that they were made at a time and under such circumstances when and where the defendant had a freedom to make or refrain from making a statement; that such statements, if made, were voluntary on his part.

[fol. 275] The Court instructs you further in this connection before you are warranted in considering or crediting for any purpose any statements made to the officers aforesaid by the defendant, you must first be satisfied the defendant was first advised by the investigating officers that he did not have to make statements, that same, if made by him, could be used against him in court, and further, that the defendant was entitled to have a lawyer present.

Members of the jury, the fact that the defendant has not seen fit to take the witness stand and testify in his own behalf is not to be considered by you for any purpose in the trial of this case. It is his right, as you understand, under the law, to testify or not as he sees fit.

When you retire to consider your verdict, you will first inquire if the defendant is guilty of the offense or offenses charged. If you find beyond a reasonable doubt the defendant guilty, you will so state in your verdict.

[fol. 276] You will consider the two counts in the indictment separately and designate in your verdict on which count or counts the defendant is found guilty beyond a reasonable doubt, and on which count or counts he is found not guilty.

You do not fix the punishment in your verdict. This is left to the sound discretion of the Court, in the event you return a guilty verdict.

Ladies and gentlemen of the jury, as I say, you will not concern yourselves in any manner in your consideration of the case with the question of the punishment that may or may not be meted out by the Court. Under Federal procedure this is a matter which rests entirely in the province of the Judge, who has the widest discretion. In the event of a guilty verdict, the proper penalty is usually the subject of a hearing in which the defendant and his attorney are permitted to participate, and it is only after full investigation of the matter that a penalty is assessed. This matter, which is of importance not only to the defendant on [fol. 277] trial but the public welfare as well, is left, as I have said, to the Judge, who is supposed to possess special competence in this field.

If, upon all of the proof, you have a reasonable doubt of the defendant's guilt of the offense or offenses defined and explained to you, it is your duty to acquit the defendant and your verdict will be not guilty.

You will agree upon your verdict mutually and not by any gambling or speculative process. And, of course, as you understand, I am sure, your verdict must be by unanimous agreement.

With these general principles firmly fixed in your mind, you will apply them carefully to the facts and circumstances of this case under the law as given you in these instructions.

Are there exceptions to the Court's charge, gentlemen? [fol. 278] Mr. Hodges: None from the Govehnment.

Mr. Harbert: None from the defendant.

The Court: Take the case, members of the jury, consider same fairly and impartially, and report to the Court such verdict as truth dictates and justice demands.

Your foreman, to be selected by you after you retire to the jury room, will sign whatever verdict you agree to, of course.

Mr. Marshal, take the jury back to its room.

(Thereupon the jury retired to begin deliberations upon its verdict.)

[fol. 279] Reporter's Certification to foregoing transcript omitted in printing.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 135

BILLY G. WOODY,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The unreported order of the Court of Appeals is appended to the application of the Petitioner for a writ of certiorari. Exhibit C.

Jurisdiction

The order of the Court of Appeals was entered on October 10, 1957. The petition for a writ of certiorari was granted on June 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether upon a conviction under the National Motor Vehicle Theft Act petitioner could be given a five-year

sentence and fine for "transporting" a stolen automobile in interstate commerce and an additional five-year sentence and fine, to be served consecutively, for "receiving and concealing" the same automobile.

Statutes Involved

18 U.S.C., Sec. 2312 (Section 3 of the National Motor Vehicle Theft Act, 41 Stat. 324, 325, as amended):

Transportation of stolen vehicles.

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C., Sec. 2313 (Section 4 of the National Motor Vehicle Theft Act, 41 Stat. 325, as amended):

Sale or receipt of stolen vehicles.

Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement

On June 24, 1954, in the United States District Court for the Western District of Tennessee, petitioner was found guilty by a jury of two violations of the National Motor Vehicle Theft Act (R. 19). The indictment was in two counts. Count 1 charged petitioner with transporting a stolen automobile in interstate commerce knowing it to have been stolen, in violation of 18 U.S.C., Sec. 2312 and

Count 2 charged him with receiving and concealing the same automobile in violation of 18 U.S.C., Sec. 2313 (Petitioner's Application, Exhibit D) (R. 19, 20). He was given the maximum sentence of 5 years and a fine of $125 on each count (R. 19), to be served consecutively. Shortly after his conviction petitioner was transferred as a mental patient to the Medical Center for federal prisoners, Springfield, Missouri. He has recently been removed from certified psychiatric status.

On July 12, 1957, petitioner applied for leave to proceed in forma pauperis in the district court on a motion to vacate the excess sentence under the provisions of 28 U.S.C., Sec. 2255 (R. 19). This proceeding was dismissed by that court on the ground that it was "without merit and not taken in good faith" (Petitioner's Application Exhibit A (R. 29, 30, 33). On appeal the Court of Appeals for the Sixth Circuit, in a memorandum opinion (R. 49, 50), denied the motion to vacate sentence because the petitioner's contention that his conduct constituted but one punishable offense under the National Motor Vehicle Theft Act "has long since been settled contrary to the petitioner's contention" (Petitioner's Application Exhibit B).

Application for a writ of certiorari was made on October 21, 1957, and the writ was granted on June 30, 1958. 2 L.ed. 2d 1549 (not officially reported) (R. 51).

Introduction

In the memorandum opinion of the Circuit Court of Appeals for the Sixth Circuit it was impliedly assumed and conceded that petitioner's acts and conduct constituted a single continuous act. For example, the court cited and relied upon a list of cases of which *Austin* v. *United States* (1955), 224 F.2d 273, is typical. In that case it was held

that even though both charges "grow out of one transaction" the fact of one transaction does not make a single punishable offense when two or more offenses are defined in the statute. Therefore it is submitted, as was the fact, that petitioner's acts and conduct in transporting, receiving and concealing the automobile constituted a single continuous act. Petitioner does not question the obvious fact that the National Motor Vehicle Theft Act defines several offenses, but petitioner does contend, when one continuous act and course of conduct by one person results in a violation of more than one section of this particular statute, that Congress did not intend that multiple, cumulative punishment could be inflicted. Since but one course of conduct was involved, a single continuous act, petitioner contends: (1) that Congress did not intend that the punishment should be pyramided and (2) that the cumulative punishment inflicted upon him falls within the proscription of all the cases in this court dealing with the fragmentation of crimes for the purpose of punishment.

ARGUMENT

I.

Petitioner Has Engaged in One Continuous Criminal Act for Which He Has Been Subjected to Cumulative, Consecutive Punishment Under the Provisions of the National Motor Vehicle Theft Act, Now Title 18 U.S.C., Secs. 2312 and 2313, Contrary to the Intention of Congress and a Common Sense Reading of These Sections.

The National Motor Vehicle Theft Act which now by revision appears in the United States Code under Stolen Property was enacted on October 29, 1919. Since that time it has been amended to apply to aircraft as well as to motor vehicles. It was also repealed and reenacted, presumably, to facilitate a revision of the Criminal Code in 1948. The relevant provisions of the act in its original form appear as follows (58 Cong. Rec. 6434):

"Be it enacted, etc., That this act may be cited as the national motor vehicle theft act.

"Sec. 2. That when used in this act:

"(a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;

"(b) The term 'interstate or foreign commerce' as used in this act shall include transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

"Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a

motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 4. That whoever shall, (with the intent to deprive the owner of the possession thereof,)[1] receive conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 5. That any person violating this act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

These provisions have not been materially altered by amendment and are substantially the same as when they were first enacted. This act was specifically designed to punish the person who transported a stolen motor vehicle in interstate commerce.[2] The short title of the act since 1940 is: "An Act to punish for the transportation of stolen motor vehicles or aircraft in interstate or foreign commerce." 18 U.S.C., Sec. 408.

In discussing the act Representative Igoe said (58 Cong. Rec. 5473):

---

[1] The words in parentheses were deleted before the Bill was finally enacted.

[2] In *United States* v. *Turley* (1957), 352 U.S. 407, the legislative history of the act was considered in part when the court defined the word "stolen" to mean not only common law larceny, as the Circuit Courts of Appeals had held, but also embezzlement or any felonious taking with the intent to deprive the owner of the rights and benefits of ownership.

> " * * * The offense sought to be reached in the act is the transportation, the taking it across the line, taking it from one State to another."

Senator Cummins stated that the significance of the act was (58 Cong. Rec. 6434):

> "This is a House bill, and the Senate committee accepted in the main the work of the House. I see no substantial objection, however, to the point made by the Senator from Connecticut. The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached."

It is petitioner's contention that Congress did not intend that section 4 should be applied merely for the purpose of increasing the punishment of a single offender. On the contrary these provisions were enacted to cover all possible offenders in the alternative because the act was specifically designed to combat one specific purpose, i.e., the transportation of stolen motor vehicles in interstate commerce. Therefore, for example, if A who transported a stolen motor vehicle in violation of section 3 could not be successfully prosecuted under that provision, he might be subjected to prosecution under section 4 of the act. The act was designed to aid the states in combating the criminal

activity of transporting stolen motor vehicles. It is suggested at this point that Congress intended to give the government two avenues by which to prosecute a transporter of a stolen motor vehicle in interstate commerce, or a confederate or accessory if he had one, and not to authorize two cumulative punishments for the defendant who consummates a single continuous criminal act. In other words Congress defined two distinct crimes, giving the prosecutor a choice where a single continuous act or transaction involves, necessarily, multiple infractions.

Secondly, one will reach the conclusion from reading the entire history of the act that section 4 was designed primarily to reach the confederate or accessories of the transporter. All the examples of possible violations under the act, discussed by the members of Congress, assume that another person other than the transporter was involved and violated section 4. Further, Representative Dyer was particularly concerned with the organized gangs operating near state lines which had successfully evaded prosecution by the states. It was pointed out that thieves would steal automobiles in one state, transport them to another state, and there a "fence" or confederates would receive, conceal, store or sell the automobiles. In his introductory remarks he explained (58 Cong. Rec. 5472):

> "It provides, gentlemen, for only two things. Sec. 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Sec. 4 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it."

Consequently, since section 4 was enacted for the primary purpose of reaching third persons who aided and abetted in the theft and transportation of motor vehicles, it was certainly not intended to be used for the purpose of pyra-

miding the punishment of a person who had violated both sections of the statute by one continuous act.

There is no direct reference in the congressional history of the act to the method of punishment of persons violating the act. The question of whether one person could be subjected to cumulative punishment was not considered. Representative Dyer did state, in his opening remarks, that the act had for its purpose the providing of "severe punishment" of those guilty of the stealing of automobiles in interstate or foreign commerce. However, this language does not warrant the conclusion that Congress thereby intended cumulative sentences for the defendant who consummates a single continuous act such as the case here presents.

In any event, should the court conclude that the congressional intention with respect to the question presented is unclear and not sufficiently spelled out, attention is respectfully called to the recent case of *Bell* v. *United States,* 349 U.S. 81, in which Mr. Justice Frankfurter stated the applicable principle of law (1 c. 83):

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. * * * It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. * * * It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, *doubt will be resolved against turning a single transaction into multiple offenses,* * * *."*

In view of the foregoing legislative history petitioner respectfully submits that it was not the intention of Congress that cumulative punishment should be inflicted for a violation involving one transaction, a single, continuous act.

II.

Petitioner Was Convicted of Multiple Offenses Involving One Continuous Course of Conduct, a Single Transaction, and Under All of the Established, Applicable Tests and Standards He Was Therefore Improperly Sentenced to Suffer Cumulative, Consecutive Punishments.

In some of the cases dealing with the fragmentation of crimes for the purpose of punishment it has been suggested that "color-matching" of cases and analogies were not helpful to the court. It is respectfully submitted, however, that this case and the question presented is determinable by the standards, tests and reasoning applied in all of the modern cases involving the infliction of multiple punishment. Petitioner's case comes within all the cases interpreting the various statutes with respect to the contention that he has committed one continuous act for which he was subjected to cumulative punishment. Therefore, irrespective of the particular statutes involved or of any language in the cases limiting their application, these cases expound a principle of law applicable to this case. They all tend to answer the single question of whether the defendant who has consummated one transaction can be subjected to cumulative punishment under the particular statute involved. A review of these cases is therefore necessary to the decision in this case.

A leading modern case is *Albrecht* v. *United States* (1927), 273 U.S. 1. In that case the defendant was con-

victed of possession and sale of the same liquor and it was held that possession and sale of the liquor constituted separate offenses warranting consecutive punishment for each violation. Mr. Justice Brandeis illustrated the fact by pointing out that one may possess liquor and not sell it, that he may cause it to be sold without possessing it, and, therefore, Congress may punish each step leading to the consummation of the transaction. The analogy and implication of the case is plain and forceful; in contrast with the sale and possession of liquor it is very difficult if not impossible to conceive of the transportation of a stolen automobile in interstate commerce without receiving and concealing it, all as a part of one transaction. The transaction is "consummated" when the defendant commits the primary act and transports the automobile. As to him there are no separate steps to consummation, in the nature of the offense of transportation, if not of necessity, he receives the automobile and he conceals it by the very act of transportation.

In *United States* v. *Adams,* 281 U.S. 202 (1930), the defendant who was president of a member bank of the Federal Reserve System made two entries on the bank's books to accomplish the fraudulent receipt of $75,000. The two entries had reference to the same transaction and were a correlated means of accomplishing a single fraud. The statute punished any officer of a federal reserve bank who made any false entry in any book of the bank with intent to defraud. The court held that the mere multiplication of entries, all to the same point and with a single intent should not multiply the punishment in proportion to the complexity of the bookkeeping. This case is clearly analogous to petitioner's case. There was one statute involved and one amount was obtained by making two entries on the books of the bank. Petitioner's case involves one statute, and one automobile which was both transported, received and concealed in one continuous transaction.

Another leading case, discussed in all the recent cases, is *Blockburger* v. *United States* (1932), 284 U.S. 299, which involved a prosecution under the Harrison Narcotics Act. The indictment consisted of 5 counts and the defendant was convicted on the second, third, and fifth counts. The second count charged a sale of drugs on a specified day not in or from the original stamped package. The third count charged a sale on the following day to the same person not in or from the original stamped package and the fifth count charged the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute. Blockburger was sentenced to five years on each count, the terms to run consecutively. It was argued that the sale charged in the third count as having been made not from the original stamped package and the same sale charged in the fifth count as having been made not in pusuance of a written order of the purchaser, constituted but one offense for which only a single penalty could be imposed. Mr. Justice Sutherland in delivering the opinion of the court, stated that the applicable rule is that where the same act or transaction constitutes a violation of two *distinct* statutory provisions, the test to be applied in determining whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Aside from the obvious factual distinction in sales and other conduct the tests applied in the *Blockburger* case are peculiarly applicable and determinative of the question presented here. As indicated, proof of the primary offense of transportation would of necessity prove the secondary offenses of receipt and concealment of a stolen automobile. As applied to the petitioner and the multiple offenses with which he was charged, the two statutory provisions did not "require(s) proof of a fact which the other does not." The most significant distinction the court makes in the *Blockburger*

case is that the two sales of narcotics to the same person on separate days did not constitute "a single continuing offense" which the court contrasted with an offense "continuous in character." In this connection petitioner respectfully repeats that the transportation, receipt and concealment of a stolen automobile is in the nature of things one continuous offense, one course of action, and, as of course, the proof of transportation is the same proof required to show that he received and concealed it.

The next case in point of time is *Michner* v. *United States* (1947), 331 U.S. 789, 157 F.2d 616, in which the court on certiorari to the Eighth Circuit Court of Appeals reversed the decision in a per curiam opinion on the authority, among others, of the *Blockburger* case. Justices Douglas, Murphy and Rutledge dissented and thought the decision of the Eighth Circuit to be sound and controlled by other cases. Therefore, the reasoning of the Eighth Circuit Court of Appeals adopted in the dissent is important with respect to its application to petitioner's case. In that case there were two counts, one, for making a plate in the likeness of one prepared by the Bureau of Engraving and, two, having the same plate in his possession, all in violation of 18 U.S.C., Sec. 264(1). Defendant was sentenced to fifteen years on each count, to be served consecutively. The Court of Appeals modified the sentence by striking out and vacating that portion of the sentence resulting from a conviction on count two. The court pointed out that the defendant could not have very well made the plate without having it in his possession and even though the same act may have constituted a violation of two distinct statutes the same evidence was required to sustain the conviction. The court said 1 c. 618:

> "There was but one transaction and one plate and the act of procuring possession was an integral part of the unlawful act of creating this plate."

First it is suggested by petitioner that the *Blockburger* case should not have been applied to this case as that case involved two distinct statutes enacted at different times while the *Michner* case involved only one statute. Secondly, upon the law and the facts in the *Michner* case petitioner's concealment of the automobile was but an incident to the transportation charged in the first count and his concealment of it was an "integral" part of the unlawful act of transporting a stolen motor vehicle in interstate commerce.

The next case in point of time is *United States* v. *Universal C. I. T. Credit Corporation* (1952), 344 U.S. 218, which involved the violation of the Fair Labor Standards Act. The indictment was in 32 counts, 6 for failure to pay minimum wages, 20 for violation of overtime provisions and 6 for failure to keep proper records. Eleven employees were involved, there were two violations charged as to each of nine employees and others with respect to the records involved four employees. The Fair Labor Standards Act provided a fine of $10,000 for violating any provision of the act and the question was whether a fine of $320,000 could be imposed. Mr. Justice Frankfurter emphasized that the offense made punishable under the Fair Labor Standards Act is "a course of conduct" 1 c. 224:

> "The offense made punishable under the Fair Labor Standards Act is a *course of conduct*. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought or action which may be deemed a single impulse, a conception recognized by this court in the Blockburger case * * *."

Likewise, as to petitioner the transportation, receipt and concealment of a stolen automobile is one course of conduct, one offense from a single thought, purpose or action and

as to him his aggregate of acts is a single course of conduct and so a single offense of which the statute compendiously treats.

The next important case is *Bell* v. *United States* (1955), 349 U.S. 81. There the defendant pleaded guilty to violations laid in two counts charging the transportation in interstate commerce of a woman for an immoral purpose, each count referring to a different woman. The two women were transported on the same trip and in the same vehicle. He was sentenced to consecutive terms of two years and six months on each of the two counts. Defendant argued that he had committed only a single offense and could not be subjected to cumulative punishment under the two counts.

On writ of certiorari to review the judgment of the United States Court of Appeals (Sixth Circuit) affirming the denial by the United States District Court of the Eastern District of Tennessee of a motion to correct the sentence, it was held that the transportation of two women for immoral purposes in the same vehicle at the same time resulted in only one offense under the Mann Act. Mr. Justice Frankfurter emphasized that when Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. Applying this reasoning to petitioner's case it may be said that nowhere in the congressional history of the National Motor Vehicle Theft Act or in common-sense reading of the statute can it be asserted without doubt that Congress intended to provide cumulative punishment for a single overt act. Therefore, as in the *Bell* case the uncertainty as to the intention of Congress should be resolved in favor of the petitioner. If the transportation of two women for immoral purposes is to be punished as a single offense the transportation, receipt and concealment of a motor vehicle by the same person at the same time is likewise a single punishable offense.

Following this decision came the case of *Prince* v. *United States* (1956), 352 U.S. 322. There an indictment was returned against the defendant in two counts, one for entering a bank with intent to commit a felony and one for robbery of the bank under 18 U.S.C., Sec. 2113. Prince was given 15 years for the robbery and 20 years for the entering, sentences to run consecutively. Mr. Chief Justice Warren in rendering the majority opinion states that the court is dealing with a statute of limited purpose and one with an inconclusive legislative history. The same observation may be made of petitioner's case, for the National Motor Vehicle Theft Act is also unique and of limited purpose. The Chief Justice also says that the statute creates and defines several crimes related to thefts in banks and that the crime of entering with intent to commit a felony *merges* with the crime of robbery when the robbery is consummated (1 c. 328):

> " • • • The heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. • • •
>
> "We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent."

By the same token, the transportation, receipt and concealment provisions of this statute were designed primarily to punish the transportation of stolen automobiles, that is the heart of the crime and concealment is merged with the completed offense as in the robbery cases.

Further, the Chief Justice states that Congress had by amendment defined separate lesser offenses, but in doing

so there was no indication that Congress intended also to pyramid the penalties. This principle is also applicable to petitioner's case. Simply defining separate offenses does not mean that Congress intended to pyramid the penalties which could be imposed for a merged offense upon a single offender who violated both sections by the same overt act.

The most recent case material to the consideration of petitioner's case is *Gore* v. *United States,* decided June 30, 1958, 2 L.ed 2d 1405, 78 S.Ct. 1280 (not officially reported). This was an indictment in six counts for narcotic offenses. The first three counts charged a sale on February 26, 1955, of 20 capsules of heroin and 3 capsules of cocaine; the last three counts charged the sale of 35 capsules of heroin on February 28, 1955. Counts one and four charged the sale of the drugs not in pursuance of a written order, in violation of Sec. 4705(a); counts two and five charged the sale not in the original stamped package, in violation of Sec. 4704(a) and counts three and six charged concealment and sale of the drugs on these respective dates with knowledge that the drugs had been unlawfully imported in violation of Sec. 2(c) of the Narcotic Drugs Import and Export Act. He was convicted on all six counts and given a sentence of one to five years on each count, the sentences on the first three counts to run consecutively, the sentences on the remaining three counts to run concurrently with those on the first three counts. Thus the total sentence was three to fifteen years. On motion to vacate sentence under 28 U.S.C., Sec. 2255, claiming that for all three counts a sentence as for only one count could be imposed, the motion was denied. On certiorari Mr. Justice Frankfurter, who delivered the majority opinion, upheld the cumulative punishment relying on the *Blockburger* case. Mr. Justice Frankfurter at the very beginning stated that Congress had made three distinct offenses in connection with the vending of illicit drugs. A little later in the opinion he

is asked to reconsider the *Blockburger* decision by reading the various specific enactments of Congress as reflecting a unitary congressional purpose to outlaw nonmedicinal sales of narcotics. He says, 1 c. (L.ed. 2d) 1409:

> "We agree with the starting point, but it leads us to the opposite conclusion. * * * The three penal laws for which petitioner was convicted have different origins both in time and design. * * * It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate punishment was declared by Congress, somehow or other ought to have carried with them an implied indication by Congress that if these three different restrictions were disregarded but, forsooth, in the course of one transaction, the defendant should be treated as though he committed only one of these offenses."

Petitioner was convicted for violating two sections of one statute, the National Motor Vehicle Theft Act, and, therefore, we respectfully submit there is nothing here to prevent application of the implication and doctrine that would have been reached in the *Gore* case had there not been three distinct penal laws having different origins both in time and design. Here Congress had only a single purpose, i.e., to stop the transportation of stolen motor vehicles in interstate commerce, therefore Congress only intended to punish as for a single offense when both sections of this act are violated by a single transaction.

Further, Mr. Justice Frankfurter says, 1. c. (L.ed. 2d) 1408:

> "The fact that an offender violates by a single transaction several regulatory controls devised by Congress

> as a means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic * * * ."

Here again petitioner points out that there is only one regulatory control devised by Congress, one statute, therefore it is a single and identic control.

Mr. Chief Justice Warren, Mr. Justice Brennan, and Mr. Justice Douglas wrote separate dissenting opinions. Mr. Justice Black concurred in the opinion written by Mr. Justice Douglas. Of course, petitioner's case comes within all three dissenting opinions. As expressed with respect to the interpretation of the congressional history of the National Motor Vehicle Theft Act, Congress intended to have both sections of the Act apply in the alternative to get at all the individual offenders' multifarious offenses. It was particularly designed to present the prosecutor with two avenues by which to prosecute one who transports an automobile in interstate or foreign commerce, and it does not authorize two cumulative punishments for the defendant who consummates a single transaction. In other words, the Act was designed to give the prosecutor a choice under the circumstances of the petitioner's case.

Petitioner further states that the cases[3] relied upon by the Circuit Court of Appeals, Sixth Circuit, in denying petitioner's motion to vacate sentences and cited in the government's brief in opposition to petitioner's application for writ of certiorari do not meet the problem presented here. Those cases simply say that Congress defined two offenses and where one transaction results in two or more violations this does not make one offense. This rea-

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[3] *Austin* v. *United States* (1955), 224 F.2d 273 (6th Circuit); *Crawford* v. *United States* (1954), 214 F.2d 313 (6th Circuit); *Madsen* v. *United States* (1947), 165 F.2d 507 (10th Circuit); *Spradley* v. *United States* (1947), 162 F.2d 203 (6th Circuit).

soning loses sight of what is involved here. Petitioner concedes that Congress has defined two or more offenses but the crux of the decision turns on whether Congress intended the punishment provided for the various offenses to apply to a single offender who commits one continuous criminal act which results in a violation of both statutes. None of those cases cite or analyze what was said in the earlier cases such as the *Albrecht* and *Blockburger* cases. Nor do they analyze the congressional history with respect to the National Motor Vehicle Theft Act.

Summary of Argument

Petitioner contends that transporting, concealing and receiving the same automobile in this case constitutes one transaction for which he was subjected to cumulative punishment under Title 18 U.S.C., Secs. 2312 and 2313 contrary to the intent of Congress and a common-sense reading of those sections. That petitioner's act and conduct constituted but one transaction, a single continuous course of conduct was conceded by the Circuit Court of Appeals, Sixth Circuit, in its disposition of his case. (See Petitioner's Application for Writ of Certiorari, Exhibit C.)

Petitioner contends that irrespective of the fact that the previously decided cases involve other statutes, and attempt to limit their application, they should be reviewed in determining whether petitioner's single transaction warrants cumulative punishment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments below be reversed and the cause remanded for the purpose of vacating and correcting the sentence in accordance with his motion under Title 28 U.S.C., Sec. 2255.

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No. 135

In the Supreme Court of the United States

OCTOBER TERM, 1958

BILLY G. WOODY, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the Court of Appeals (R. 49–50) is reported at 258 F. 2d 535.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1957 (R. 49). The petition for a writ of certiorari was filed on October 23, 1957, and was granted on June 30, 1958 (R. 51). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the two counts of the indictment can be deemed to involve only one act or transaction, and whether the transcript of the trial, which is now avail-

able, should be considered in resolving that issue in this proceeding under 28 U. S. C. 2255.

2. Whether, in the circumstances of this case, petitioner could validly be given cumulative sentences under the National Motor Vehicle Theft Act for both "transporting" a stolen automobile in interstate commerce and for separately "receiving and concealing" it.

STATUTES INVOLVED

18 U. S. C. 2312 (Section 3 of the National Motor Vehicle Theft Act, 41 Stat. 324, 325, as amended) provides:

> *Transportation of stolen vehicles.*
>
> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 2313 (Section 4 of the National Motor Vehicle Theft Act, 41 Stat. 325, as amended) provides:

> *Sale or receipt of stolen vehicles.*
>
> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

1. In the United States District Court for the Western District of Tennessee, on June 24, 1954,

petitioner was found guilty by a jury of two violations of the National Motor Vehicle Theft Act under an indictment in two counts (R. 19). Count one charged that petitioner, on or about March 16, 1954, transported a stolen Buick automobile in interstate commerce from Sheffield, Alabama, to Savannah, Tennessee, in violation of 18 U. S. C. 2312, Section 3 of the Act (*supra*, p. 2), knowing that the Buick had been stolen (R. 20). Count two charged that on or about the same date in the Western District of Tennessee petitioner received and concealed the same Buick, which was moving in interstate commerce from Sheffield, Alabama, to Savannah, Tennessee, in violation of 18 U. S. C. 2313, Section 4 of the Act (*supra*, p. 2), knowing that the Buick had been stolen (R. 20). Petitioner was given consecutive sentences of 5 years on each count, for a total of 10 years' imprisonment, and was fined $250 (R. 19).

The present proceedings arose on July 12, 1957, when petitioner applied for leave to proceed in forma pauperis in the District Court on a motion to vacate sentence under the provisions of 28 U. S. C. 2255 (R. 19–29). Petitioner alleged in effect that he had been wrongfully charged with two offenses, and that his conduct in transporting and concealing the stolen automobile constituted but one act and one offense, punishable by a total maximum of 5 years' imprisonment (R. 20, 21). On August 5, 1957, the District Court denied leave to proceed in forma pauperis. It adverted to the fact that petitioner had filed several previous petitions under Section 2255 and ruled that

petitioner's contentions should have been raised at the trial, stating that it was familiar with the facts (R. 29–30). Subsequent to the filing of petitioner's notice of appeal from this ruling (R. 30–31), the District Court on September 5, 1957, entered an order denying the motion for leave to appeal in forma pauperis, and certified that the appeal was "without merit and not taken in good faith" (R. 32, 33).

On September 14, 1957, petitioner filed in the United States Court of Appeals for the Sixth Circuit an application for leave to appeal in forma pauperis (R. 34–36), and, four days later, a motion to remand the proceedings to the District Court for findings of fact and conclusions of law under his motion to vacate sentence (R. 38–47). On October 10, 1957, the Court of Appeals denied both the motion for leave to proceed in forma pauperis and the motion to remand. It stated in its order that the law had long been settled in the Sixth Circuit and "in every federal court where the precise question has arisen" that petitioner could be separately punished under both sections of the Motor Vehicle Theft Act.[1] It also denied the motion to remand for the reason that the facts relied upon were not in dispute (R. 49–50).

---

[1] In a prior proceeding under 28 U. S. C. 2255, petitioner had presented, *inter alia*, the same question for review and the Court of Appeals had denied leave to appeal in forma pauperis. See No. 227 Misc., Oct. Term 1955, certiorari denied, 350 U. S. 939.

2. The pertinent evidence adduced at the original trial[2] showed that the Roadmaster Buick with Texas license plates (Motor No. 68791157, R. 124) was stolen on March 2, 1954, at Texarkana, Arkansas (R. 58–60, 53). It was recovered on April 8, 1954, when petitioner was arrested in Savannah, Tennessee (R. 109–110, 112).

The books of the Tax Assessor's Office and Probate Court of Colbert County, Alabama, show that on March 3, 1954, a Billy Woody applied for Alabama plates on a 1954 Roadmaster Buick, allegedly purchased in Tennessee (R. 63–77). When the car was recovered, it was discovered that the public motor number of the Buick had been changed to 68791050 (R. 118–119, 121, 124). After petitioner's arrest, the police found in the car a receipt for his Alabama license tags and a notarized bill of sale for the Buick which bore the incorrect, altered, motor number, 68791050 (R. 109–111, 130–131). On March 16, 1954, in Alabama, petitioner and another man came before a notary and the other man,

[2] After the grant of certiorari in this case, petitioner moved *pro se* for a transcript of the evidence at his trial in support of his contentions. (The trial testimony had not been transcribed.) The government suggested that the motion be denied with leave to renew after counsel was appointed, since it might be possible to reach a stipulation as to the facts; the Court then denied the motion without prejudice. When counsel was appointed, he renewed the request for a transcript, and a copy was furnished to him at government expense. Thereafter, he chose not to designate it for printing, but the government did so. It has been printed in the record before this Court. See the discussion of this procedure in the Argument, *infra*, pp. 13–15, 18–20.

who called himself Harold Hobart, had his signature notarized on the bill of sale (R. 113–114).[4]

Several changes in the physical appearance of the Buick were made during the interval between its theft and its recovery. Prior to the theft, the body of the car had been painted yellow and the top was painted black (R. 53, 59). About April 1, in Savannah, Tennessee, petitioner and another painted the car so that it was all black. They had a blanket or tarpaulin hanging on the fence near the place where the painting was being done (R. 93, 94, 97–98, 101, 102, 105, 107). Petitioner hired an experienced automobile painter to finish the paint job (R. 98, 100, 105). Before the theft, the right rear fender was bent (R. 55, 59, 60), and petitioner later repaired this with the assistance of the automobile painter (R. 99, 100). Originally, there was no large tank in the trunk compartment (R. 57), but, when the stolen car was recovered, it had a second gas tank of approximately 12-gallon capacity concealed above the regular tank. There was a copper connection from this reserve tank to the fuel pump, and when a connecting hose was attached to another automobile from which gasoline could be stolen, the fuel pump of the Buick would pump the gasoline from the other automobile into the reserve tank in the trunk compartment of the Buick (R. 126–128, 133–134).

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[4] The books of the Alabama Probate Court carried the motor number 68799957 whereas the original receipt (as discovered in the car after its recovery) had Motor No. 68791050. The books also gave the date as March 3, whereas the original had the date of March 16 (R. 77). The car was seen in Savannah, Tennessee, about March 4, with Alabama license plates (R. 89–90).

In his charge to the jury, the trial judge pointed out that it was the government's contention that petitioner did "receive or conceal, through the changing of license numbers and painting of the car, among other things," the automobile alleged to have been stolen (R. 140). He noted that the illegal transporting of a stolen automobile and the receiving and concealing it were "separate offenses" under "separate counts" (R. 136, 139–140), and charged, "You will consider the two counts in the indictment separately and designate in your verdict on which count or counts [petitioner] is found guilty beyond a reasonable doubt, and on which count or counts he is found not guilty" (R 143).

SUMMARY OF ARGUMENT

In denying leave to proceed in forma pauperis, the courts below apparently held, in accord with numerous lower court decisions, that even if (as petitioner alleged) the receipt and concealment of the stolen automobile occurred as an inseparable part of the interstate transportation of the vehicle, the two counts of the indictment—charging (1) transportation and (2) receipt and concealment—stated two separate offenses for which separate punishment could validly be imposed. However, the trial transcript, which was obtained after this Court granted the petition for a writ of certiorari and leave to proceed in forma pauperis, negates petitioner's allegation that those were the facts in his case. It makes explicit not only, as the government had argued abstractly in its brief in opposition, that acts of concealment can be separate from the transportation, but that in this case acts of conceal-

ment separate from the interstate transportation were affirmatively proved, and that the case was submitted to the jury on the theory that the acts of concealment charged were in addition to the transportation. Whether the trial record is considered by this Court or not, this case cannot be decided as if it involved only one act or transaction of transportation. And since separate acts involving separate impulses were charged and proved, separate sentences were properly imposed.

I

A. The decisions of this Court seem to hold that if, on collateral attack (including proceedings under 28 U. S. C. 2255), there is no dispute as to what occurred at the trial and no necessity to resolve factual issues which should have been submitted to the jury, a court may consider the record, including the transcript, to determine whether multiple consecutive sentences related to one transaction or to multiple transactions. The government has never questioned that, where it appears from the face of the indictment and the judgment that a sentence illegally imposes double punishment for the same offense, the error is one which may be corrected on collateral attack. That has been established as far back as *In re Snow*, 120 U. S. 274, at a time when there was no direct review in criminal cases and review came only by way of a petition for a writ of habeas corpus and subsequent appeal to this Court. This Court has also held that, where the indictment suggests the possibility that offenses for which consecutive sentences were imposed related to one transaction and an allegation to that effect is conceded to be

true, the undisputed facts may be accepted for the purpose of collateral attack. *Morgan* v. *Devine,* 237 U. S. 632. In the situation where a defendant collaterally attacking a judgment as imposing double punishment makes allegations of fact to which the government does not accede, but which the record affirmatively proves or disproves, *Ex parte Nielsen,* 131 U. S. 176, 183, seems to us to be authority for the proposition that the Court may consider the record of the trial as bearing upon the legality of the sentence. In the days when habeas corpus was the method of obtaining appellate review, it seems to have been fairly common practice to attach a record of the trial to habeas corpus proceedings, and the Court accepted the undisputed record as proof of facts which went to a jurisdictional issue cognizable on habeas corpus.

The cloudy situation, which the government discussed in *Ladner* v. *United States,* No. 2, this Term, is that presented either when there is no record of the trial (as in *Ladner*) or the record is silent (or conflicting) with respect to the facts which are alleged to show that the sentence was beyond the power of the court to impose. That situation is not present here. In this case, the facts relating to the claim of illegal sentences appear of record, and there is no reason why the Court should not consider them.

B. The transcript reveals clearly that at the trial there was proof of independent acts of concealment, including a false application for license plates in Alabama and alteration of the motor number, distinct from the transportation of the stolen vehicle, occurring both before and after the interstate transporta-

tion charged in the indictment. Moreover, the trial court submitted the case to the jury on the basis that the government had charged separate acts of receiving and concealing "through the changing of license plates, and painting of the car, among other things." The trial record thus refutes the premise of petitioner's argument that only one act or transaction was involved.

C. If the trial record is not deemed properly before the Court at this time, the case must nevertheless be decided on the basis that the acts of concealment and of transportation were separate. There is nothing on the face of the indictment, except that the events are alleged to have occurred on or about the same date, to indicate that the acts of concealment were an inseparable part of *one* transaction. It was necessary for petitioner, in collaterally attacking the judgment, to present the factual foundation for his attack. This he has not done. It will therefore have to be presumed that the indictment covered separate acts.

II

A. Since the concealment of the stolen automobile in this case involved separate acts motivated by separate criminal impulses, which were distinct from the transportation, there is no reason why petitioner should not be separately punished for such separate acts of wrongdoing. The rule of lenity, announced by this Court in *Bell* v. *United States*, 349 U. S. 81, 83–84, is a rule "against turning a single transaction into multiple offenses" where the Congressional intent is not clear. Nothing in that decision casts the slight-

est doubt on the proposition that, if the defendant there had separately transported two different women at two different times, he would have committed two different offenses under the same statute. The importance of the singleness of the criminal impulse is highlighted by the decision of this Court in *Ladner* v. *United States,* No. 2, this Term, decided December 15, 1958, where the Court sent the case back for a hearing as to whether the wounding of two federal officers in resisting arrest was the result of one shot or more, holding that the firing of one shot could constitute only one offense under the statute. Thus, the problem of statutory construction was regarded as involving different considerations if the case showed one criminal impulse or more than one.

We think this principle largely disposes of the problem of this case. If two acts of the same character are separate offenses under the same statute when they result from separate criminal impulses at different times, there is no reason why separate acts of different character, occurring at different times, should not be separate offenses under two different sections of a statute.

B. Neither the language or the legislative history of the Dyer Act indicates that Congress intended the transporter of a stolen vehicle not to be subject to additional separate punishment for additional separate acts of concealment. The two sections, 18 U. S. C. 2312 and 2313 (formerly Sections 3 and 4 of the National Motor Vehicle Theft Act), concededly

create separate offenses. Section 2312 punishes anyone who transports in interstate commerce a stolen vehicle, knowing it to have been stolen; Section 2313 punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" a stolen vehicle moving as part of interstate commerce, knowing it to have been stolen. Of the various acts specified by Section 2313, only receipt would always necessarily be involved in the transportation. All the other acts could occur before, during, or after a particular interstate transportation, and would normally involve additional affirmative acts of criminality. As this case illustrates, concealment can involve such affirmative separate acts of wrongdoing as changing motor numbers, executing false bills of sales, painting, and making major repairs. These affirmative additional acts are properly subject to punishment cumulative to the sanction fixed for the transportation.

The legislative history suggests that, while Congress undoubtedly intended to reach confederates of the transporter by Section 2313, it also intended to subject the transporter himself to extra punishment if, in addition to the transportation, he performed the separate acts which Section 2313 proscribes.

Numerous decisions of courts of appeals have held, on collateral attack, that, even on the assumption that the acts of concealment occurred as a very part of the transportation, Section 2313 proscribes acts which must necessarily be in addition to the bare interstate transportation forbidden by Section 2312, and therefore that such additional acts are properly subject to separate punishment. There is certainly no reason

to hold, as it would be necessary to hold to sustain petitioner's position, that acts of concealment which are distinct from and in addition to the transportation are freed from separate punishment when performed by the transporter.

ARGUMENT

INTRODUCTION

The indictment in this case charged that both the act of transportation and the receipt and concealment of the stolen motor vehicle took place on or about March 16, 1954. In his motion to correct sentence, petitioner alleged that both charges stemmed from one act (R. 19–21). At that time, the trial proceedings had not been transcribed. While the trial judge stated that he was familiar with the facts, he did not specify the basis on which he found no merit in petitioner's contentions—whether this was because petitioner's allegations of fact were inaccurate or because his legal theory was erroneous. The Court of Appeals, in denying both the motion for leave to appeal in forma pauperis and the motion to remand, stated that the facts were not in dispute; but, as we read the decision, particularly in the light of the rulings of its own and other circuits which it cites, this represents a holding that, even on the facts as petitioner stated them to be—that the evidence proved only one transaction—petitioner could validly be sentenced under both sections of the Motor Vehicle Theft Act.

When the case came before this Court on the petition for a writ of certiorari, the government first

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pointed out (in its brief in opposition) that the denial of leave to proceed in forma pauperis was reasonable in the light of numerous decisions and of the prior proceeding by this petitioner in which the same issue had been raised and rejected. The government then discussed the merits of the position that petitioner could not be sentenced under both sections; we pointed out that concealment necessarily involved something more than transportation, and expressed the view that this in itself, under the decided cases, rendered the offenses separate "even though steps in a continuing transaction." There was no attempt to distinguish between the different situations that might be presented if the proof at the trial showed one act or transaction, or different acts at different times.[4]

In view of the grant of certiorari in this case, and the permission to proceed in forma pauperis, the government takes the position that the merits are now before the Court, there being no occasion to remand the cause for reconsideration of the denial of leave to appeal since the Court of Appeals had expressed its view of the basic legal issue involved. See *Pollard* v. *United States*, 352 U. S. 354, 359. Accordingly, when it developed that the facts of petitioner's trial were fairly complex and might be difficult to stipulate, and when appointed counsel requested that he be furnished with a copy of the transcript, the record was transcribed and a copy was furnished to counsel at government expense. The government also filed a

[4] The trial record had not then been transcribed.

copy with this Court and designated it for inclusion in the record. See footnote 2, *supra*, p. 5.

The transcript of the trial makes explicit not only, as the government had argued abstractly in its brief in opposition, that acts of concealment can be separate from the transportation, but that in this case acts of concealment separate from the interstate transportation were affirmatively proved, and that the case was submitted to the jury on the theory that the indictment charged acts of concealment in addition to the transportation. It is the government's position that, whether the trial record is considered by the Court or not, this case cannot be decided on the theory that it involved only one act or one transaction. If the record cannot be considered, then the two counts of the indictment, which *could* relate to separate acts, must be taken to have covered separate acts. If the record is properly before the Court, then it makes clear that more than one act was actually involved. In either event, the Court is not called upon in this case to construe the statutes as if there was only one act or transaction, motivated by a single criminal impulse.

However, in view of the recent decision in *Ladner* v. *United States*, No. 2, this Term, decided December 15, 1958 (in which, unlike this case, there was no transcript of record available), we discuss first the extent to which a court may consider a trial record on collateral attack charging illegal consecutive sentences. Then, we discuss the precise issue as to consecutive sentences which, in our view, is properly before the Court in this case, *i. e.*, whether the transporter of a

stolen car may ever be guilty of the crime of receiving and concealing that car while it is moving as interstate commerce.

I. THIS CASE DOES NOT INVOLVE A SINGLE ACT OR TRANSACTION

A. *If there is no dispute as to what occurred at the trial and no necessity to resolve factual issues which should have been submitted to the jury, a court on collateral attack may consider the record, including the trial transcript, to determine whether multiple consecutive sentences involve one act or transaction, or multiple transactions.*

The government does not argue, and did not argue in *Ladner* v. *United States*, No. 2, this Term, that the validity of consecutive sentences on multiple counts can never appropriately be an issue cognizable on collateral attack (under 28 U. S. C. 2255, or otherwise). The question which it discussed in *Ladner* was "the extent to which issues of fact relating to the evidence developed at a trial can be a basis of collateral attack on a judgment" (see the Brief for the United States, No. 2, this Term, p. 25). It confined its discussion to the problems presented by the particular situation in that case where there was no transcript available or possible, and there was a real chance, not only that conflicting testimony (which the jury should have resolved) might have been offered at the trial on the issue of the number of shots, but also that there would even be a conflict at a hearing as to what had occurred at the trial. This is the opposite extreme of an attack on multiple sentences

where the circumstances appear from the face of the indictment. In between the two extremes are varying situations which the government did not discuss in *Ladner*, because they were not there involved, but which are more pertinent here.

1. There is no doubt that where it appears from the face of the indictment and the judgment that a sentence is illegal, either because it is excessive or because it involves double punishment for the same offense, the error is one which may be corrected on collateral attack. That was established as far back as *Ex parte Lange*, 18 Wall. 163, and *In re Snow*, 120 U. S. 274, at a time when there was no direct review in criminal cases, and review could be had only by way of a petition for a writ of habeas corpus and subsequent appeal to this Court. It has been held that where the illegality appears from the face of the indictment such an issue may even be raised by a motion to correct sentence (now under Rule 35) even though this is a motion of very limited scope which is confined to the old common law record, *i. e.*, the indictment, the pleadings, and the proof.[5] See *Holiday* v. *Johnston*, 313 U. S. 342, 349.

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[5] See *United States* v. *Morgan*, 346 U. S. 502, 506, and *United States* v. *Bradford*, 194 F. 2d 197, 201 (C. A. 2), certiorari denied, 343 U. S. 979, as to the nature of the motion under Rule 35. In *Tinder* v. *United States*, 345 U. S. 565, which involved the question of whether the offense was punishable as a misdemeanor rather than a felony, the government itself suggested that the issue, which had been raised by a motion under 28 U. S. C. 2255, was cognizable under Rule 35, even though 28 U. S. C. 2255 did not lie because the defendant had been released from custody (see Brief for the United States, No. 113, Oct. Term, 1952, pp. 4–5, fn. 3).

2. Where the indictment suggests the possibility that the offenses for which consecutive sentences were imposed involved only one transaction and an allegation to that effect is conceded to be true, the Court has also held that the undisputed facts may be accepted for the purpose of collateral attack as if these facts appeared on the fact of the indictment. *Morgan* v. *Devine,* 237 U. S. 632; *Bell* v. *United States,* 349 U. S. 81;* *Prince* v. *United States,* 352 U. S. 322.

3. One step removed (but still different from the situation before the Court in *Ladner*) is that presented where the defendant, collaterally attacking a judgment as imposing double punishment, makes allegations of fact, to which the government does not accede but which the trial record affirmatively proves or disproves. *Ex parte Nielsen,* 131 U. S. 176, 183, seems to us to be authority for the proposition that, in that event, the Court may consider the record of the trial as bearing upon the legality of the sentence. That defendant had pleaded guilty to an indictment, returned in September 1888, charging unlawful cohabitation with a woman not his wife for the period from October 15, 1885, to May 13, 1888. He thereafter was indicted for adultery with the same woman on May 14, 1888. To that second indictment he en-

* In the government's brief in opposition in *Bell* v. *United States* (No. 180 Misc., Oct. Term, 1954), it raised the question whether the claim of one transaction could be asserted where the factual basis of the claim did not appear from the face of the indictment. It did not press that position on the merits, after the grant of certiorori, since the allegation that there was only one transportation in that case was found on inquiry to be true and correct.

tered a plea of previous conviction, contending that the indictment for unlawful cohabitation covered the period up to the finding of the indictment in September 1888, and thus embraced the time within which the adultery was alleged to have been committed. The government demurred to the plea and the demurrer was sustained. After the petitioner was convicted and sentenced on the adultery charge, he attacked the sentence by way of habeas corpus. This Court held that if the fact of double conviction "appears in the indictment, or anywhere else in the record (of which the judgment is only a part), it is sufficient. In the present case it appeared on the record in the plea of *autre fois convict,* which was admitted to be true by the demurrer of the government. We think that this was sufficient" (131 U. S. at p. 183).

At the time *Nielsen* was decided—when, as already noted, direct review was not available in criminal cases—it seems to have been fairly common to attach a record of the trial to habeas corpus proceedings. See, for example, *Ex parte Bain,* 121 U. S. 1, where the Court quoted the exact language used at the trial with respect to its ruling that the indictment had been improperly amended. If the issue raised was considered a jurisdictional one, which could be reached on habeas corpus, the trial record was accepted as proof of the allegations with respect to lack of jurisdiction. Cf. *Harlan* v. *McGourin,* 218 U. S. 442, 447–448, where in declining to examine a bill of exceptions offered in support of the contention that there was no evidence to support a verdict, this Court distinguished cases

where the record was accepted with relation to jurisdictional facts.

Following this authority and practice, it seems to us that, where the trial record is available to show exactly what occurred, the Court may consider the facts which that record establishes. Thus, in *Gore* v. *United States,* 357 U. S. 386, the government did not question the petitioner's right to file with this Court a transcript of the testimony at the trial in support of his allegation that the three offenses there involved arose out of one act of sale. The trial record here refutes, rather than establishes, petitioner's allegations (see *infra,* pp. 23–25), but the principles involved are the same as those laid down in *Nielsen.* So long as the facts clearly appear in the record, there is no reason why the Court should not consider them.

4. For the purposes of this case, it is unnecessary to go beyond this point, but for the sake of completeness we shall also deal with the cloudy situation, discussed by the government in *Ladner,* which is presented either when there is no record or the record is silent (or conflicting) with respect to the facts which are alleged to show that the sentence was beyond the power of the court to impose. We have found no decisions of this Court discussing this problem in the context of an attack on multiple sentences, so that it becomes necessary to look to analogous situations.[7] As appears from the summaries of prior decisions in both the majority and the dissenting

[7] The Court pretermitted the problem in *Ladner* (slip op., pp. 3–4).

opinions in *Sunal* v. *Large,* 332 U. S. 174, 178–181, and 185–187, the decisions of this Court have not been entirely consistent with respect to the power on collateral attack to reconsider issues, even though jurisdictional, which could have been but were not decided, or were wrongly decided at the time of the trial. In the days when habeas corpus was a method of review of issues deemed jurisdictional, the Court laid down the rule that a defendant asserting lack of jurisdiction could present facts which were supplementary to the record, but not contradictory to it. In *In re Cuddy,* 131 U. S. 280, 286, the Court held that where a defendant attacking a judgment of contempt did not allege and did not show that the contempt was not in the presence of the court, it had to be presumed that the evidence made out a case of contempt. The opinion noted, however, that if the defendant had alleged that the misbehaviour was outside the presence of the court "he would have been entitled to the writ, and, upon proving such facts, to have been discharged. Such evidence would not have contradicted the record." But contrast, at a later period, *Craig* v. *Hecht,* 263 U. S. 255, which held that the impropriety of a conviction for contempt was an issue for appeal and not for collateral attack. There is a similar difference in authorities on the question of reviewing, in collateral proceedings, an attack on the constitutionality of a statute. Cf. *Ex parte Siebold,* 100 U. S. 371, with *Glasgow* v. *Moyer,* 225 U. S. 420. We did not in *Ladner* discuss those earlier cases because we considered that this

Court had itself summed up the matter in *Sunal* v. *Large,* 332 U. S. 174, 179:

> * * * Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, habeas corpus is increasingly denied in case an appellate procedure was available for correction of the error. Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by *habeas corpus* has sometimes been granted. * * *

The question apparently narrows down to whether the court deems the case to present "exceptional circumstances," which justify reconsideration of jurisdictional issues, even though they could have been reached on appeal. See *Bowen* v. *Johnston,* 306 U. S. 19, 27.

Clearly, if a factual issue has been raised and submitted to the jury, it would be contrary to the whole trend of the decisions of this Court to allow that factual issue to be relitigated on collateral attack. Although couched in terms of jurisdiction to impose sentence, an attack on the judgment in such circumstances would be nothing more than an attack on the sufficiency of the evidence to support the conviction, which has long been recognized as not being an issue cognizable on collateral attack. See *Harlan* v. *McGourin,* 218 U. S. 442; and see *Bowen* v. *Johnston,* 306 U. S. 19, 27, noting that courts should not exercise the power to re-examine jurisdictional issues on collateral attack "where there are

essential questions of fact determinable by the trial court." If the record as to what occurred in this case at the trial were less clear than it is, that rule would in itself preclude petitioner from asserting that there was in this case only one transaction, for as we point out *infra*, pp. 23–25, the jury were instructed that the acts of concealment charged were in addition to the transportation.

The more difficult problem is presented by the situation where the facts relied upon for collateral attack are not clear or were never decided in the trial court, *e. g.*, if there was a plea of guilty, or if the evidence at the trial did not prove, or the jury was not called upon to decide, the question one way or the other. In that event, the court on collateral attack would not be reviewing something decided by the trial court, and to that extent the case could be said to present "exceptional circumstances" under the *Bowen* case. On the other hand, it seemed to us in *Ladner*, and seems to us now, that the whole tenor of the majority opinion in *Sunal* v. *Large*, 332 U. S. 174, is to preclude a defendant, collaterally attacking a judgment, from trying, years later, to prove at a new hearing facts which could have been, but were not, made an issue at the trial. And the situation becomes particularly complicated where, as in *Ladner* itself, no record is available and it becomes necessary to try to reconstruct, by testimony, what happened at the trial.

B. *The trial record shows that the acts of concealment proved at the trial were separate from the transportation charged in the indictment, and that the case*

was submitted to the jury on the theory that the charged acts of concealment went beyond the transportation.

Here, there was a trial and the transcript is now available. As discussed, *supra*, pp. 18 *ff*, we believe that that transcript can properly be taken into account in this proceeding under 28 U. S. C. 2255.

The transcript reveals clearly that at the trial there was proof of affirmative acts of concealment, distinct from the transportation of the stolen vehicle and the incidental receipt and concealment that might be involved in that transportation. Separate acts of concealment had occurred in Alabama, while the car was moving in interstate commerce from Arkansas to Tennessee, before the transportation from Alabama to Tennessee on which the indictment was founded. Whether it occurred on March 3 or March 16 (see *supra*, pp. 5–6), the act of applying for a license under a false motor number on the basis of an alleged purchase which had never occurred was certainly separate and apart from the subsequent transportation. See the Statement, *supra*, pp. 5–6. In addition, there was the act of concealment involved in getting the false bill of sale notarized in Alabama and in changing the number of the car at some unknown time, but presumably before the bill of sale was notarized on March 16. *Supra*, pp. 5–6. And then, in Tennessee, there were further acts of concealment in the painting of the car. *Supra*, p. 6. Furthermore, the trial court submitted the case to the jury on the basis that the indictment charged separate acts of receiving and concealing "through the changing of license plates and painting of the car, among other things." *Supra*, p. 7.

The trial record thus completely refutes the premise of petitioner's argument that only one act and one transaction was involved. The acts of concealment were not merely coextensive with the transportation, but were both prior and subsequent to that transportation and distinct from it.

C. *Even if the trial record is not considered by the Court, this case cannot be decided on the assumption that there was only one act.*

If the trial record is not deemed properly before the Court at this time, the case must nevertheless be decided on the basis (which the trial record merely makes explicit) that the acts of concealment and of transportation were separate. There is nothing on the face of the indictment, except that the events are alleged to have occurred "on or about" the same date, to indicate that the two acts charged were parts of *one* act or transaction. It was therefore necessary for petitioner, in collaterally attacking the judgment, to present the factual foundation for his attack. This he has not done. See *In re Cuddy,* 131 U. S. 280, discussed, *supra,* p. 21. See also *Ex parte Hull,* 312 U. S. 546, where the petitioner claimed, as to a second conviction, a denial of due process by reason of variance between pleading and proof; in addition to discussing the merits, the Court specifically noted at p. 551: "Furthermore, ascertainment of these facts is impossible since petitioner has not furnished the transcript taken at the second trial. Accordingly, it would be improper to inquire whether petitioner was denied procedural due process in the second trial." In the absence of contrary proof, by a trial record or by agree-

ment of counsel, it would have to be presumed that the two counts of the indictment, which clearly *could* cover separate acts, actually did so. It is established that where an indictment on its face purports to charge a federal offense, it cannot be challenged after conviction, unless it appears from the indictment's face that no offense could possibly have been committed. *Goto* v. *Lane,* 265 U. S. 393; see also *Knewel* v. *Egan,* 268 U. S. 442. By a parity of reasoning, it cannot be assumed on collateral attack that two counts of an indictment which do not on their face necessarily relate to one act or transaction nevertheless do so.[8]

II. THE TRANSPORTER OF A STOLEN MOTOR VEHICLE MAY BE SEPARATELY PUNISHED FOR ACTS OF CONCEALMENT WHICH ARE SEPARATE FROM AND IN ADDITION TO THE TRANSPORTATION

We have shown in Point I that, either from the face of the indictment or on consideration of the trial record, this case should be decided on the basis that the acts of concealment of which petitioner was found guilty were in addition to, and not merely a part of, the transportation. In our view, the only issue which this case properly presents, therefore, is whether the transporter of a stolen motor vehicle may be subject to separate punishment for such separate acts. There is no reason in principle, or in the language or legislative history of the statute, why he should not be.

[8] Unlike *Bell* v. *United States,* 349 U. S. 81 (see footnote 6, *supra,* p. 18), the government cannot (of course) concede here that only one act or transaction was involved.

A. *The rule of lenity does not make one offense out of separate acts motivated by separate criminal impulses.*

The decision of this Court in *Ladner* v. *United States,* No. 2, this Term, decided December 15, 1958, makes clear that it is of significance to the problem of determining whether consecutive sentences may be imposed for related acts to consider whether the offense involved one transaction or more than one. The Court there, faced with the problem of whether consecutive sentences could be imposed under former 18 U.S.C. 254 (present 18 U.S.C. 111) for assault on two federal officers while resisting arrest, sent the case back for a hearing to determine whether the wounding of two federal officers was the result of one shot or more, holding that the firing of one shot could constitute only one offense, even if two officers were wounded. The problem of statutory construction was regarded as involving different considerations if the case showed one criminal impulse or more than one.

The importance of this consideration was foreshadowed by other recent decisions, although not there emphasized because the facts were not in dispute in those cases. In *Bell* v. *United States,* 349 U.S. 81, 83–84, in explaining the rule of lenity, the Court said, "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction

into multiple offenses". The rule of lenity is thus limited to the situation where the offenses involve a single transaction; it is a rule "against turning a single transaction into multiple offenses" where the Congressional intent is not clear. Inevitably, this makes it of concern to the Court whether the transaction before it is single or multiple. Nothing in the *Bell* opinion casts the slightest doubt on the proposition that the transportation of one woman is a crime under the Mann Act. Nor is there anything to suggest that the transportation of two women at two different times would not be two offenses under that statute. Similarly, the decision in *Prince* v. *United States,* 352 U.S. 322, that entry into a bank with intent to rob and the completed robbery after entry were not separably punishable does not mean that entry into a bank is not made punishable. It is only in the factual pattern where the entry and the robbery are part of one act or transaction that the Court found that Congress did not intend to impose multiple punishment. And in *Gore* v. *United States,* 357 U.S. 386, where the majority held that Congress intended to authorize separate punishment under different statutes, even though deriving from one transaction, none of the opinions, majority or dissenting, implies that the two separate sales there proved would not constitute two separate offenses even under one statute. In *United States* v. *Universal C.I.T. Corp.,* 344 U.S. 218, 224–225, the Court distinguished between a course of conduct motivated by a single impulse and a "wholly distinct managerial decision" as to another possible violation. See also *Hoag* v. *New*

Jersey, 356 U. S. 464, and *Ciucci* v. *Illinois*, 356 U. S. 571, where the Court held that the states could properly treat offenses against different persons occurring at the same time as separate offenses.

We think this principle largely disposes of the problem of this case. If two separate sales motivated by two separate impulses can be two offenses under the same statute, we see no reason why separate acts of transportation and concealment occurring at different times are not separate offenses under two different sections of the Dyer Act. See also the government's brief in *Heflin* v. *United States*, No. 137, this Term, at pp. 19–24.

B. *There is nothing in the language or legislative history of the statute which indicates that Congress did not intend the tranporter to be separately punished for separate acts of transportation and of concealment.*

1. The two sections here involved (Sections 3 and 4 of the National Motor Vehicle Theft Act, 41 Stat. 324 (now 18 U. S. C. 2312 and 2313) *supra*, p. 2) concededly make provision for two separate offenses. Section 2312 punishes anyone who transports in interstate commerce a stolen motor vehicle, knowing it to have been stolen; Section 2313 punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" a stolen vehicle moving as part of interstate commerce, knowing it to have been stolen.

Of the various acts specified by Section 2313, only "receives" would almost always necessarily be involved in the transportation itself. "Conceal," "barter" or "store" could occur before, during, or

after a particular interstate transportation even though the car was still in interstate commerce. "Sell" and "dispose of" would usually occur after some interstate transportation in order to be federally punishable. It is thus evident from the face of the statute that Congress had in mind the punishment of acts which were separate from, and in addition to, the interstate transportation, and which would normally require a criminal impulse separate and different from the act of transporting.

It cannot be contended, as petitioner urges, that the transportation of a stolen automobile in interstate commerce and its concealment or disposal must necessarily merge. An accused who merely transports a stolen automobile interstate is not guilty of the same degree of criminality as one who, in addition to the illegal transportation, conceals the automobile so that its ultimate return to the true owner becomes more unlikely. As this case illustrates, acts of concealment can involve such affirmative separate acts of wrongdoing as changing motor numbers, executing false bills of sale, repainting, and major repairs. Those affirmative additional acts are in themselves offenses under Section 2313,* and are properly subject to additional punishment. The term "whoever" which introduces Section 2313, *supra*, p. 2, is of broadest possible coverage. It includes the person who does the transporting if, in addition to transporting, he com-

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* *Donaldson* v. *United States*, 82 F. 2d 680 (C. A. 7); *United States* v. *Di Carlo*, 64 F. 2d 15 (C. A. 2); *United States* v. *Guido*, 200 F. 2d 105 (C. A. 2); *Phillips* v. *United States*, 206 F. 2d 923 (C. A. 10).

mits any of the several acts which Section 2313 punishes. Indeed, if Congress had intended Section 2313 to apply only to someone other than the transporter—*i. e.*, a confederate or "fence"—it would have been easy enough to provide for punishment of one who conceals, barters, sells, etc., a stolen motor vehicle "received from" a person who transported it in interstate commerce. The language which Congress used shows that it intended to punish anyone who separately does the affirmative acts which Section 2313 prohibits, whether he is the transporter or someone else.

Moreover, a person who violates Section 2312 does not necessarily have the intent to violate Section 2313. Because of the limitations of federal jurisdiction, the violator of Section 2312, the transporter, may or may not be the thief. He could be merely a person hired to transport the car after the theft, with no interest in the car before or after any one transportation. It thus would be particularly incongruous to hold that a person who does acts in addition to transporting—acts designed in a further way to keep the car from its original owner—was not intended to be separately punishable for those additional acts.

2. The legislative history suggests that, while Congress undoubtedly intended that third person confederates receiving and concealing stolen automobiles after interstate transportation would be held liable under Section 4 of the Dyer Act, it also intended to impose a cumulative penalty upon a person, such as the petitioner here, who commits both the offenses proscribed in Section 3 and Section 4.

The report of the House Committee on the Judiciary, H. Rep. No. 312, accompanying H. R. 9203, 66th Cong., 1st Sess., p. 1, stated that the purpose of the bill was for:

> * * * the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. There has been and is now a most widespread demand for such a law. State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines. The losses to the people of the United States by reason of this stealing amounts to hundreds of thousands of dollars every year. It is getting worse. It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 percent. It is automobiles of that price that are generally stolen. Automobile thieves who make a specialty of this crime do not steal many of the higher priced cars, the reason being of course that they are not so easily sold. * * *

In the House debate, Congressman Dyer, the sponsor, announced that the purpose of the legislation was to suppress crime in interstate commerce, and continued (58 Cong. Rec. 5472):

> * * * Automobiles admittedly are tangible property, capable of being transmitted in interstate commerce. The larceny of automobiles is made a crime under the laws of all the States

> in the Union. No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it with the penalties attached.
>
> * * * * *
>
> [The bill] provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it.

In the debate in the Senate, Senator Cummins spoke of the two separate sections of the Act here involved in the following words (58 Cong. Rec. 6434):

> * * * The practice is to steal an automobile close to a State line and run it across the State line. The first section [§ 3]is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, *to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen.* * * * [Emphasis added.]

When he spoke of the further practice to dispose of the vehicle to some other person, confederate or other-

wise, Senator Cummins must have had the transporter in mind. His statement indicates that, in committing such additional acts, the transporter would be guilty of an offense under Section 4 (now 18 U. S. C. 2313).

Congress intended not lenity, but severe sentences, for double violators of Section 3 and 4, so that there would be an effective deterrent to the criminal practices which Congress sought to eliminate. The transporter who "conceals, stores, barters, sells, or disposes of" the vehicle performs the same proscribed acts as another who does likewise, except that the transporter is guilty of the additional crime proscribed in Section 4. As illustrative, see *United States* v. *Hampden,* 294 Fed. 345 (E. D. Mich.), denying a petition for modification of sentences against a single accused for violation of both Sections 3 and 4. The court said (294 Fed. at 348):

> * * * It certainly cannot be said in the present case that the concealing or storing of the stolen automobile in Detroit was necessarily an incident of its transportation to Detroit. Such transportation ended on arrival at its destination. The concealment and storage occurred after such arrival. Petitioner, in fact, concedes that in the systematic stealing of automobiles, which the Dyer Act was designed to reach, one party usually does the stealing, and another party at the end of the line receives and stores and sells the stolen transported automobile, and that it was the purpose of this statute to make each of these acts a crime, and thereby to punish each offender concerned therein. *The fact, however, that each of these acts, which Congress has thus defined as a separate legal offense, has*

> *been committed by the same person, instead of by several persons, cannot render them any the less separate offenses,* and, the jury having found that petitioner committed each of the forbidden acts, he was properly convicted and sentenced for each of the crimes created by Congress and charged in the indictment. [Emphasis added.]

It is significant, moreover, that the 79th Congress, which amended the original Act to include stolen aircraft (59 Stat. 536), interpreted Sections 3 and 4 as proscribing separate and distinct crimes without reference to whether one or more persons were involved in the transaction. Both S. Rep. No. 40, p. 1, and H. Rep. No. 866, p. 1, 79th Cong., 1st Sess., stated as follows:

> The National Motor Vehicle Theft Act, enacted October 29, 1919, makes it a crime to transport or cause to be transported in interstate commerce a motor vehicle knowing the same to have been stolen. It is also a crime to receive, conceal, store, barter, sell or dispose of such a motor vehicle knowing that it has been stolen. Maximum penalties under the act are fixed at $5,000 fine, or 5 years' imprisonment, or both.

3. The numerous lower federal court decisions, to which the court below adhered (R. 49–50), have consistently taken the position that the two sections provide separate offenses for transporting a stolen automobile and for receiving and concealing it, so that cumulative sentences may be imposed. *York* v. *United States,* 299 Fed. 778 (C. A. 6); *Chrysler* v. *Zerbst,* 81 F. 2d 975 (C. A. 10); *Doll* v. *Johnston,* 95

F. 2d 838 (C. A. 9), certiorari denied, 304 U. S. 574; *Jackson* v. *Hudspeth*, 111 F. 2d 128 (C. A. 10); *Record* v. *Hudspeth*, 126 F. 2d 215 (C. A. 10), certiorari denied, 316 U. S. 703; *Lindsay* v. *United States*, 134 F. 2d 960 (C. A. 10), certiorari denied, 319 U. S. 763; *Batson* v. *Squier*, 146 F. 2d 264 (C. A. 9), certiorari denied, 324 U. S. 874; *Madsen* v. *United States*, 165 F. 2d 507, 510 (C. A. 10); *Crawford* v. *United States*, 214 F. 2d 313 (C. A. 6); *Austin* v. *United States*, 224 F. 2d 273 (C. A. 6); *United States* v. *Hampden*, 294 Fed. 345 (E. D. Mich.); *United States* v. *Runion*, 47 F. Supp. 594 (E. D. Ky.); *United States* v. *Spradley*, 65 F. Supp. 136 (W. D. Ky.), affirmed, 162 F. 2d 203 (C. A. 6). These cases (except *York*) arose on collateral attack and for the most part the courts found it unnecessary to determine whether in fact the offenses were part of one act of transportation as the defendant normally alleged. They pointed out that, even on that assumption, each section required proof of acts which the other did not and that under the decisions of this Court [10] this in itself made the offenses distinct. For example, in *Chrysler* v. *Zerbst, supra*, the court said (81 F. 2d at 976):

> * * * each count of the indictment charged a separate and distinct offense. The offense charged in count one involved the element of

[10] *E. g., Lindsay* v. *United States*, 134 F. 2d at p. 961, fn. 1, cites *Blockburger* v. *United States*, 284 U. S. 299 (two offenses from one sale of narcotics); *Burton* v. *United States*, 202 U. S. 344 (unlawfully receiving compensation and agreeing to receive it); *Morgan* v. *Devine*, 237 U. S. 632 (forcibly entering a post-office to commit larceny and larceny); *Gavieres* v. *United States*, 220 U. S. 338 (disorderly conduct and insulting a police official).

> transportation in interstate or foreign commerce, and receiving and concealing the motor vehicle was not an element thereof. The offense charged in count two involved the elements of receiving and concealing the motor vehicle and transportation thereof in interstate commerce by the defendants, was not an element of that offense.

And in *Lindsay* v. *United States, supra,* the separability of the two statutory offenses is recognized in this language (134 F. 2d at 960–961):

> Congress may prohibit and make punishable as a separate and distinct offense each separate and distinct act or step of a single transaction which embraces an element which the others do not.
>
> * * * * *
>
> While the offenses charged in count two may have been directly related to the transportation of the automobile from Portales to Tulsa and a continuation of that transaction, each required proof of a fact not required to establish the charge in count one, namely, receiving, concealing, and storing the automobile. It follows that the offenses charged in count two were separate and distinct from the offense charged in count one.

The *Lindsay* decision pointed out the transporter could conceal the automobile during transportation (134 F. 2d at p. 962) and since, by his plea of guilty, the defendant there admitted that he did conceal it, the court upheld the consecutive sentences on both counts.

In sum, Section 2313 proscribes acts which, except for receipt, must necessarily be in addition to the interstate transportation proscribed by Section 2312, even if they are committed as a very part of that interstate transportation. There is reason to believe that Congress intended such separate acts to be separately punishable whether or not they occurred at the time, and as a part, of the transportation. But certainly there is no reason to hold, as it would be necessary to hold in this case to sustain petitioner's position, that acts of concealment, which are clearly distinct from and in addition to the transportation are not subject to separate punishment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment denying petitioner's motion to vacate sentence should be affirmed.

Respectfully submitted.

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